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RELIGION AS SPEECH: THE GROWING ROLE OF FREE SPEECH JURISPRUDENCE IN PROTECTING RELIGIOUS LIBERTY

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Most discussion of religious liberty, at least from a constitutional perspective, primarily focuses on the two religion clauses of the First Amendment—the guarantee of free exercise of religion and the prohibition against establishments of religion.[1] Focusing on these two clauses is not surprising, since they make specific reference to religion—that is their only concern—and they address two common threats to religious liberty: government interference with religion, protected by the Free Exercise Clause, and government promotion of religion, protected by the Establishment Clause.[2] And, indeed, the religion clauses have played and will continue to play an important role in protecting religious liberty in the United States.[3]

Less appreciated, however, is the critical role played by the First Amendment's Free Speech Clause in protecting religious liberty.[4] Although free speech, unlike the Free Exercise and Establishment Clauses, is not intentionally designed to protect religious liberty, as a practical matter it has often done so.[5] In fact, when it comes to protecting a person's or group's right to exercise religion, the Free Speech Clause has been used much more frequently than the Free Exercise Clause.[6] For reasons to be

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1. The First Amendment to the Constitution reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

2. *Id.*

3. *See, e.g., infra* text accompanying notes 76-83, 220-26.

4. *See infra* Part I.

5. *See, e.g., infra* text accompanying notes 15-26.

6. *See infra* Part II.

discussed in this article, that will be even more true in the future.

This article explores the role of free speech jurisprudence in protecting religious liberty, both describing how that role has grown in recent years and evaluating its propriety for the twenty-first century. The article begins by briefly examining the historic role free speech doctrine has played in protecting religious liberty through the mid-1980's, when the Rehnquist Court began. Part two will then discuss how during the Rehnquist Court free speech became perhaps the primary vehicle to protect religious liberty. Although the Rehnquist Court largely followed earlier holdings regarding religious speech, it changed the analysis in two significant ways: first, by characterizing the exclusion of religious speech from public fora as viewpoint, rather than subject-matter discrimination, and second, by making neutral treatment of religion the defining feature of the Court's Establishment Clause jurisprudence. Taken together, these two developments made free speech a potent vehicle to protect religious activity and expression in American public life. At the same time, the Rehnquist Court also greatly limited the scope of protection under the Free Exercise Clause, further shifting protection of religious liberty toward the Free Speech Clause.

Finally, part three will briefly discuss what this increasing focus on free speech as the primary basis to protect religion means and what role it might play in the twenty-first century. Part A discusses how the Supreme Court's recent cases suggest that the Court itself views religion as a full co-participant in America's public life, to be received on the same terms as any other world view or value system. Under this vision, religion is neither privatized on the one hand nor given special constitutional protections on the other, in contrast to views often advocated by legal scholars. This more minimalist approach to the religion clauses deprives religion of much, though not all, of its unique status under the Constitution, but also grants its full entry into the public square. Part B then assesses how well this "religion as speech" approach fits with America in the twenty-first century, arguing that in most respects it does quite well. In particular, treating religion as a co-participant poses little threat to American values and political stability at this stage of our nation's history, and in fact enhances, rather than detracts from the core American values of equality and individual liberty. It arguably is also well suited to the challenges that religion itself will face this century, which will more likely focus on societal attempts to privatize religious influences, rather than intentional interference with or promotion of religion. Free speech doctrine, which requires equal treatment, is well-positioned to address such societal pressures.

I. THE HISTORIC ROLE OF FREE SPEECH IN PROTECTING RELIGIOUS LIBERTY

Free speech doctrine has long played a central role in protecting religious liberty.[7] In fact, religion and free speech have long had a strong, even symbiotic relationship.[8] On the one hand, free speech doctrine has long protected religious liberty, providing a doctrinal basis to protect various religious activities.[9] On the other hand, religion provided building materials for the construction of free speech doctrine, especially in the early years of its development: the 1930's, 40's and 50's.[10] It is not an exaggeration to say that religious speech contributed as much as political speech during those critical decades to the emergence of modern free speech protection.

This symbiotic relationship was largely attributable to the zeal of one particular sect, the Jehovah's Witnesses, which was a frequent party to early Supreme Court decisions.[11] Pursuant to the dictates of their religion, the Jehovah's Witnesses aggressively took to the streets, often rubbing against both the sensibilities of their listeners and the boundaries of local laws.[12] As a result, the Witnesses often ended up in court, and had a remarkable ability to argue their cases all the way up to the Supreme Court, being a party in about twenty Supreme Court decisions from the late 1930's to the early 1950's.[13] More often than not they won,[14] and in doing so the Jehovah's Witnesses helped to build the foundation of modern free speech jurisprudence.

Two cases are illustrative of the Jehovah's Witnesses' early role in advancing free speech jurisprudence. In *Lovell v. City of Griffin*,[15] a 1938

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7. *See infra* text accompanying notes 15-26.

8. *See infra* text accompanying notes 15-26.

9. *See infra* text accompanying notes 15-26.

10. *See infra* text accompanying notes 15-34.

11. MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 124 (2d ed. 2006).

12. *Id.*

13. *Id.* at 596. For examples of early Supreme Court decisions involving the Jehovah's Witnesses, *see* Poulos v. New Hampshire, 345 U.S. 395 (1953); Fowler v. Rhode Island, 345 U.S. 67 (1953); Niemotko v. Maryland, 340 U.S. 268 (1951); Saia v. New York, 334 U.S. 558 (1948); Marsh v. Alabama, 326 U.S. 501 (1946); Tucker v. Texas, 326 U.S. 517 (1946); Follett v. Town of McCormick, 321 U.S. 573 (1944); Taylor v. Mississippi, 319 U.S. 583 (1943); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Martin v. City of Struthers, 319 U.S. 141 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Douglas v. City of Jeannette, 319 U.S. 157 (1943); Jamison v. Texas, 318 U.S. 413 (1943); Largent v. Texas, 318 U.S. 418 (1943); Jones v. City of Opelika, 316 U.S. 584 (1942); Cox v. New Hampshire, 312 U.S. 569 (1941); Schneider v. New Jersey, 308 U.S. 147 (1939); Lovell v. City of Griffin, 303 U.S. 444 (1938).

14. MCCONNELL ET AL., *supra* note 11, at 596.

15. 303 U.S. 444 (1938).

decision, a city ordinance in Griffin, Georgia required that before anyone could distribute circulars, handbooks, advertising or literature the person had to get written permission from the city manager.[16] Alma Lovell, a devout Jehovah's Witness, violated the ordinance by distributing pamphlets and magazines without first getting permission.[17] She did not deny she violated the ordinance, but said that she was "sent 'by Jehovah to do His work'" and that to even apply for permission would have been "'an act of disobedience to His commandment.'"[18]

The United States Supreme Court agreed with Ms. Lovell that she did not need permission to distribute the literature, but not because it violated her religion.[19] Rather, the Court observed that the permit requirement constituted a prior restraint on Ms. Lovell's right of free speech, and was therefore unconstitutional.[20] This was one of the early decisions solidifying the Court's commitment to scrutinize prior restraints, and reflected that protections against prior restraints went not only to the institutional press, but also to individuals distributing literature.[21]

A second case was *West Virginia State Board of Education v. Barnette*,[22] which involved a state law that required students to recite the Pledge of Allegiance.[23] Barnette was a Jehovah's Witness whose religion said that it was wrong to pledge allegiance to anything or anyone but Jehovah, and so refused to participate.[24] The Supreme Court, in a 1943 decision, agreed with Barnette, but grounded its reasoning not so much on religion as on free speech principles, stating: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can

16. *Id.* at 447.

17. *Id.* at 448.

18. *Id.*

19. *Id.* at 451.

20. *Id.* at 451-52.

21. In recognizing First Amendment protection against prior restraints, the Court stated:

> The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.

Lovell, 303 U.S. at 452. In subsequent cases, many of them involving the Jehovah's Witnesses, the Court solidified its suspicion of licensing as a prior restraint, holding that it will be permitted only if supported by important government interests and if the permitting process contains sufficiently clear criteria to limit the decisionmaker's discretion. *See, e.g.*, Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Village of Stratton, 536 U.S. 150, 162-63 (2002); Saia v. New York, 334 U.S. 558, 559-60 (1948); Cox v. New Hampshire, 312 U.S. 569, 575-76 (1941). *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 964-68 (3d ed. 2006).

22. 319 U.S. 624 (1943).

23. *Id.* at 628-29.

24. *Id.* at 629.

prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[25] With this case, the Court established what is now known as the compelled speech doctrine, which provides that the right to free speech includes the right not to speak, and therefore a person cannot be forced to espouse beliefs against his or her wishes.[26]

These are just two examples from a large number of cases illustrating how these early free speech cases involving the Jehovah's Witnesses helped to protect religious exercise on the one hand, but how they helped provide the materials to build a strong free speech jurisprudence on the other. In doing so, these early free speech cases established two important principles regarding religious speech. First, the decisions left no doubt that the protections of free speech, only then beginning to be recognized by the Court in a meaningful fashion, extended in full to a variety of religious speech activities, most of which involved proselytizing in some manner. Thus, the distribution of religious tracts, open-air preaching, and selling of religious literature were all protected forms of speech.[27] To the Court, trying to convert someone to one's religious beliefs was no different than converting someone to a political position. In fact, the Court appeared not even to think twice about the religious content of the speech, automatically giving it the same protection as political or other speech.[28]

The second principle to emerge from these early decisions that has proved to be very significant for religious speech was the idea that when regulating speech government cannot discriminate against speech because of its content.[29] Although the Court indicated that government can impose reasonable time, place, and manner restrictions on speech to further important government interests,[30] it was quick to strike down regulations that created the potential for content discrimination.[31] The Court was especially sensitive in these early cases to discretionary licensing schemes that required that a speaker get a government permit before engaging in

25. *Id.* at 642.

26. *See, e.g.*, Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557, 581 (1995); Keller v. State Bar of California, 496 U.S. 1, 15-16 (1990); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235-36 (1977); Wooley v. Maynard, 430 U.S. 705, 714 (1977).

27. *See, e.g.*, Saia v. New York, 334 U.S. 558, 561 (1948); Martin v. City of Struthers, 319 U.S. 141, 146-47 (1943); Lovell v. City of Griffin, 303 U.S. 444, 452 (1938).

28. *See, e.g.*, *Saia*, 334 U.S. at 561.

29. *See id.*; *Martin*, 319 U.S. at 145-47; Cantwell v. Connecticut, 310 U.S. 296, 309-10 (1940).

30. *Saia*, 334 U.S. at 562; *Martin*, 319 U.S. at 143; *Cantwell*, 310 U.S. at 304.

31. *Saia*, 334 U.S. at 560-61; *Martin*, 319 U.S. at 146-47; *Lovell*, 303 U.S. at 452.

various forms of expressive activities.[32] This, of course, constituted a prior restraint, which is problematic to begin with, but the Court was also concerned that if the process for receiving a permit lacked appropriate standards, permits would be granted or denied based upon whether the person issuing permits favored or disfavored the particular speech in question.[33] The Court's decisions made it clear that the First Amendment would not tolerate the potential for such content discrimination.[34]

The second of these two concerns, that government cannot discriminate when it regulates speech, emerged over the next several decades as probably the central principle governing free speech jurisprudence. On the one hand, the Court continued to recognize that government can impose reasonable time, place, and manner restrictions on speech to serve substantial government interests, as long as the restrictions did not overly suppress speech and did not regulate speech based on its content.[35] On the other hand, almost all restrictions based on content, with only a few exceptions, were held invalid. This was famously reflected in a 1972 decision, *Police Department of the City of Chicago v. Mosley*,[36] where the Court stated, "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[37] Using this mandate of content-neutrality, the Court struck down a large number of restrictions on speech that turned on the content of the speech.[38] This was true even where the restriction was relatively modest and left plenty of alternative ways to communicate the message.[39] The restriction was still invalid if it treated some speech contents different than other speech contents.[40] Conversely, the Court upheld most restrictions on speech that did not turn on content, as long as the restrictions served important government interests

32. *See, e.g.*, Kunz v. New York, 340 U.S. 290, 295 (1951); *Saia*, 334 U.S. at 560-61; Schneider v. New Jersey, 308 U.S. 147, 163-64 (1939).

33. *See Kunz*, 340 U.S. at 295; *Saia*, 334 U.S. at 560-61; *Schneider*, 308 U.S. at 163-64.

34. *See* Niemotko v. Maryland, 340 U.S. 268, 284 (1951) (emphasizing that permits to engage in expressive activities cannot be denied because of disagreement with views of a speaker).

35. *See, e.g.*, Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984); Grayned v. Rockford, 408 U.S. 104, 115 (1972); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 50-51 (1987).

36. 408 U.S. 92 (1972).

37. *Id.* at 95.

38. *See, e.g.*, Boos v. Barry, 485 U.S. 312, 321 (1988); Carey v. Brown, 447 U.S. 455, 462 (1980); *Mosley*, 408 U.S. at 95. For a discussion of the content-neutrality requirement, *see* CHEMERINSKY, *supra* note 21, at 932-41.

39. *See, e.g.*, *Carey*, 447 U.S. at 462.

40. *See Boos*, 485 U.S. at 321; *Carey*, 447 U.S. at 462; *Mosley*, 408 U.S. at 95.

and left ample alternatives for communication.[41]

This growing emphasis on content-neutrality in regulating speech can be seen in two 1981 decisions involving religious speech: *Heffron v. International Society for Krishna Consciousness*[42] and *Widmar v. Vincent*.[43] In *Heffron*, the Court reviewed a Minnesota state fair regulation which prohibited the sale or distribution of literature within the fairgrounds except from a designated booth.[44] The International Society for Krishna Consciousness challenged the regulation, arguing that the restriction interfered with its ability to practice its religion by distributing literature.[45] The Court rejected the argument, finding that the restriction constituted a valid time, place, and manner restriction.[46] Emphasizing that the restriction applied equally to all speech, no matter what its content,[47] the Court applied an intermediate standard of review, finding that the restriction served a significant government interest in controlling crowds at the fair and was narrowly tailored to serve that interest.[48] Further, the restriction left adequate alternatives for speech, since the regulation allowed the Krishnas to distribute literature and solicit funds from a booth within the fairgrounds, and the Krishnas were free to pursue those same activities unrestricted outside the fairgrounds.[49]

Therefore, although the Court declined to protect the religious speech in question, its holding was based on the substantiality of the state's interest, the minimal impact it had on the Krishnas' ability to spread its message, and, most importantly, the fact the same restriction applied to all other speech, no matter what its content.[50] This was a standard analysis that had emerged for analyzing restrictions on speech in public areas, and the religious speech was simply treated the same as other speech, no better and no worse.[51] Indeed, the Court went out of its way to stress that religious groups do not enjoy any greater rights "to communicate, distribute, and solicit on the fairgrounds" than any other group with "social, political, or

41. *See, e.g.*, Frisby v. Schultz, 487 U.S. 474, 483-84 (1988); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984); Grayned v. Rockford, 408 U.S. 104, 115 (1972).

42. 452 U.S. 640 (1981).

43. 454 U.S. 263 (1981).

44. 452 U.S. at 643.

45. *Id.* at 644-45.

46. *Id.* at 648-49.

47. *Id.*

48. *See id.* at 649-54.

49. *Id.* at 654-55.

50. *See supra* notes 47-49.

51. *See Heffron*, 452 U.S. at 648-49.

other ideological messages to proselytize."[52] Since the Krishnas were not being discriminated against, and since the state had a substantial interest in regulating speech activity within the fairgrounds, the regulation was upheld.[53]

In contrast, in *Widmar v. Vincent*,[54] the second of the 1981 decisions involving religious speech, the Court held that a public university could not prohibit a religious group from using campus facilities when the use of such facilities was extended to non-religious groups.[55] In that case the University of Missouri at Kansas City had permitted over a hundred different student groups, reflecting a wide range of interests and opinions, to have access to campus buildings to meet.[56] However, university policy prohibited the use of campus buildings "for purposes of religious worship or religious teaching,"[57] believing such a prohibition was required by the Establishment Clause.[58] For that reason the university refused to grant similar rights to Cornerstone, an evangelical student group whose meetings consisted of prayer, singing, and Bible study.[59]

The Supreme Court, in an 8-1 decision, held for the students, saying that exclusion of a student group based on its religious speech violated the Free Speech Clause, while inclusion of a religious group on the same terms as other groups did not violate the Establishment Clause.[60] The Court began its analysis by noting that the university was not obligated to open up its facilities to student groups, but once it did so it had to make them available on a content-neutral basis.[61] Unlike *Heffron*, where the state had regulated speech on a content-neutral basis,[62] in *Widmar* the university violated that principle by treating religious speech less favorably than other speech, which violated Cornerstone's free speech rights.[63] The Court also rejected the university's Establishment Clause argument, saying that providing equal access to religious speech did not violate the Establishment Clause, since it treated religion neutrally and as such did not place the

52. *Id.* at 652-53.
53. *Id.* at 654-56.
54. 454 U.S. 263 (1981).
55. *Id.* at 265.
56. *Id.*
57. *Id.*
58. *Id.* at 270-71.
59. *Id.* at 265 n.2.
60. *Widmar*, 454 U.S. at 273.
61. *Id.* at 267-68.
62. Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 648-49 (1981).
63. *Widmar*, 454 U.S. at 269.

state's imprimatur on religion.[64]

In one way, *Widmar* was not a particularly surprising or eventful decision, since it was a logical extension of previously recognized principles concerning religious speech. As noted above, the Court had long included religious speech within the protections of the Free Speech Clause.[65] Similarly, concerns about content discrimination had informed free speech doctrine since the 1930's and 40's, and had emerged in the 1970's as the Court's principal free speech concern.[66] Thus, to hold that a university's discrimination against a group because of the religious content of its speech was unconstitutional was quite predicable and consistent with precedent.

Nonetheless, *Widmar* was significant for three reasons. First, *Widmar* clarified that the protections of free speech went not only to religious proselytizing and preaching, activities designed to engage others in dialogue and thus similar to other types of speech, but also include such core religious practices as prayer and worship.[67] Justice White's lone dissent in *Widmar* had argued that prayer and worship do not constitute speech in its normal meaning,[68] but the majority specifically rejected that position, stating that "UMKC has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment."[69] The majority elaborated on this in a lengthy footnote, saying that "[t]here is no indication when 'singing hymns, reading scripture, and teaching biblical principles' cease to be 'singing, teaching, and reading'—all apparently forms of 'speech,' despite their religious subject matter—and become unprotected 'worship.'"[70]

Second, the Court reaffirmed the content-neutrality requirement, but did so in what is now known as a designated or limited public forum context.[71] In previous cases the Court had invalidated government procedures that required a permit before engaging in speech activity, such as a parade, if permits might be granted or denied based on speech

64. *Id.* at 274-75.
65. *See supra* text accompanying notes 15-34.
66. *See supra* text accompanying notes 27-34.
67. *Widmar*, 454 U.S. at 265.
68. *Id.* at 284.
69. *Id.* at 269.
70. *Id.* at 269 n.6.
71. *Id.* at 267-68.

content,[72] and had also struck down content restrictions in traditional public fora like streets and sidewalks.[73] But in *Widmar* the Court held that even if government is not required to open its facilities to speech, once it voluntarily chooses to create a speech forum, it cannot discriminate against speech because of its content.[74] This is significant since the role of traditional public fora, such as streets and parks, are declining as centers of speech activity, while in the future limited public fora, voluntarily created by the state, are likely to play the greater role as facilitators of speech. This has certainly been the case with many of the Court's recent religious speech cases.[75]

Finally, and perhaps most importantly, the Court held that providing equal access to religious speech, as mandated by the Free Speech Clause, did not violate the Establishment Clause, even when it resulted in religious worship on public property.[76] Although the Supreme Court had long protected religious speech, *Widmar* was the first case where extending protection to religious speech began to rub up against the Establishment Clause.[77] In finding that granting equal access to a religious group would not violate the Establishment Clause, the Court applied the three-part *Lemon* test,[78] quickly noting that the first and third prongs were easily met, since an equal access policy has a secular purpose of non-discrimination and would avoid excessive entanglement with religion.[79] Thus, the only issue was whether providing equal access to religious groups would have a primary effect of advancing religion.[80] The Court concluded it would not,

72. *See, e.g.*, Shuttlesworth v. Birmingham, 394 U.S. 147, 150-53 (1969); Cox v. Louisiana, 379 U.S. 536, 555-58 (1965); Saia v. New York, 334 U.S. 558, 561 (1948).

73. *See* Carey v. Brown, 447 U.S. 455, 462 (1980); Police Dep't v. Mosley, 408 U.S. 92, 95 (1972).

74. *Widmar*, 454 U.S. at 267-68 ("The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place.").

75. *See infra* Part II.

76. *Widmar*, 454 U.S. at 277.

77. *Id.* at 267 n.5.

78. *Id.* at 271. The *Lemon* test, consistently used by the Court in the 1970's and 1980's to decide Establishment Clause issues, states that to be constitutional a government act must meet a three-prong test: "First, the [government] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the [act] must not foster 'an excessive government entanglement with religion.'" Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). Although the *Lemon* test dominated Supreme Court Establishment Clause analysis in the 1970's and 1980's, for the past two decades it has declined in influence, but has never been overruled or explicitly rejected.

79. *Widmar*, 454 U.S. at 271-72.

80. *Id.* at 272.

for two reasons.[81] First, an equal access policy would not confer the state's imprimatur on religion since it would simply be treating Cornerstone the same as any other student group.[82] Second, since over 100 student groups participated in the university's open forum, the forum's primary effect was not to advance religion, absent a showing that religious groups would dominate the forum.[83]

Taken as a whole, *Widmar* reflected a strong emphasis on the need to treat religion neutrally, with a certain symmetry between the Free Speech and Establishment Clauses. On the one hand, content-neutrality is mandated by the Free Speech Clause, and therefore excluding a religious group from a state-created speech forum violates free speech.[84] On the other hand, to treat a religious group neutrally, giving it the same access as other student groups to a speech forum, mitigated any Establishment Clause concerns that might exist when religious speech occurs on public property.[85] In particular, neutral treatment dissipates any perception of endorsement and minimizes any primary effect of advancing religion when part of a larger forum.[86] Yet the Court in *Widmar* did not apply a neutrality test per se in analyzing whether an equal access policy would violate the Establishment Clause, and its analysis suggested that even a neutral treatment of religion might be unconstitutional if religious groups dominated a forum.[87]

This emphasis on neutrality, though only partial in *Widmar*, became central over the next quarter century, particularly in the religion jurisprudence of the Rehnquist Court.[88] As the next section will discuss, the Rehnquist Court made neutrality the primary component of First Amendment protection of religious rights, using it as a benchmark in analyzing free speech, free exercise and Establishment Clause issues. Although diluting protection under the Free Exercise Clause, the Court's neutrality analysis solidified the significant protection afforded under the

81. *Id.* at 274.

82. *Id.*

83. *Id.* at 274-75.

84. *Id.* at 274.

85. *Widmar*, 454 U.S. at 274.

86. *See id.* at 274 ("First, an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices. As the Court of Appeals quite aptly stated, such a policy 'would no more commit the University . . . to religious goals' than it is 'now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance,' or any other group eligible to use its facilities.").

87. *See id.* at 275.

88. *See infra* Part II.

Free Speech Clause.[89] Moreover, the Court's increasing emphasis on neutrality toward religion eliminated any Establishment Clause concerns when giving religious speech equal access to government-created speech fora.[90]

II. THE REHNQUIST COURT, NEUTRALITY, AND RELIGIOUS SPEECH

The previous section showed that by the 1981 decisions in *Heffron* and *Widmar*, content-neutrality had become a central focus in analyzing free speech rights, including religious speech, and played a significant, though not dispositive role in Establishment Clause analysis. During the Rehnquist Court this emphasis on neutrality became even more pronounced, with the Court largely taking a view of religion as a co-equal participant in our nation's public life, to be neither favored nor disfavored.[91] This resulted in an even more pronounced shift to free speech, and away from free exercise, as the dominant protection of religious liberty.[92] This section will examine those two developments.

A. The Increasing Focus on Free Speech

The Rehnquist Court's increasing protection for religion as speech is reflected in four primary cases:[93] *Board of Education v. Mergens*,[94] *Lamb's Chapel v. Center Moriches Union Free School District*,[95] *Rosenberger v. Rector and Visitors of the University of Virginia*,[96] and *Good News Club v.*

89. *See infra* Part II.

90. *See infra* Part II.A.

91. *See infra* Part II.A.

92. *See infra* Part II.A.

93. Religious speech was involved in a number of other cases during this period, but the religious character of the speech was not central to the analysis. In some cases the Court held that the speech restrictions were unconstitutional, *see, e.g.*, Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Village of Stratton, 536 U.S. 150, 165-66 (2002) (striking down ordinance that required permit to go onto private property to distribute literature); Bd. of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 574-75 (1987) (ban on any person engaging "in First Amendment activities" in airport terminal unconstitutional), while in other instances the speech restrictions were upheld as reasonable. *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 683-84 (1992) (prohibition on solicitation of funds within airport terminal constitutional, while prohibition of literature distribution unconstitutional).

94. 496 U.S. 226 (1990).

95. 508 U.S. 384 (1993).

96. 515 U.S. 819 (1995).

Milford Central School.[97] All four cases had generally the same fact pattern, similar to that in *Widmar*.[98] Each involved a public school, ranging from elementary to a four-year university, and in each case the school decided to create what could be viewed as a forum for speech purposes, in two cases only for students themselves and in two others for community groups and organizations.[99] In each case, however, the school denied access to religious speech because of perceived Establishment Clause problems.[100] And in all four cases the Court said, as it had earlier said in *Widmar*, that to deny access to a group because of the religious content of its speech violated the Free Speech Clause, and to grant equal access to religious speech eliminated any Establishment Clause concerns that might otherwise exist.[101] Although *Widmar* was certainly strong precedent for each of the cases, the Court in fact extended the level of protection previously recognized in *Widmar*.[102]

The first case in which the Rehnquist Court employed this analysis was *Board of Education v. Mergens*,[103] in which a high school permitted about 30 student clubs to meet on campus, but denied permission to a Bible study club because school officials believed recognizing a student religious group would violate the Establishment Clause.[104] The students sued under the "Equal Access Act,"[105] a federal statute that in effect extended the protections of *Widmar* to high school campuses.[106] In essence, the Act said that once a school created a forum for student clubs, it could not exclude a group based on its content, specifically mentioning religious clubs as one example.[107] The Supreme Court held for the students, finding that exclusion of the Bible study club violated the Equal Access Act, and that permitting the group to meet as part of a broader forum of student groups did not violate the Establishment Clause.[108]

Because the Court analyzed the students' speech rights under the Equal

97. 533 U.S. 98 (2001).

98. *See* Widmar v. Vincent, 454 U.S. 263, 265 (1981).

99. *See Good News Club*, 533 U.S. at 102; *Rosenberger*, 515 U.S. at 822-23; *Lamb's Chapel*, 508 U.S. at 386; *Mergens*, 496 U.S. at 231.

100. *See Good News Club*, 533 U.S. at 112; *Rosenberger*, 515 U.S. at 827-28; *Lamb's Chapel*, 508 U.S. at 394-95; *Mergens*, 496 U.S. at 232-33.

101. *See Good News Club*, 533 U.S. at 112-13; *Rosenberger*, 515 U.S. at 831; *Lamb's Chapel*, 508 U.S. at 395; *Mergens*, 496 U.S. at 246-47.

102. *See, e.g.*, *Good News Club*, 533 U.S. at 112-13.

103. 496 U.S. 226 (1990).

104. *Id.* at 231-33.

105. *Id.* at 233.

106. 20 U.S.C. § 4071(a)-(b) (1998).

107. 20 U.S.C. § 4071(a).

108. *Mergens*, 496 U.S. at 253.

Access Act,[109] the majority did not directly address constitutional free speech rights as such.[110] As a practical matter, however, the case had strong constitutional overtones, in part because the Act itself was largely based on the Court's own analysis in *Widmar*.[111] There was little doubt that the Congressional purpose in passing the Act was to extend to high school students the same rights the Court had recognized for college students in *Widmar*.[112] This point was made clear in a concurring opinion by Justice Marshall, joined by Justice Brennan, that said the Equal Access Act simply codified what was already constitutionally required under the Free Speech Clause—prohibiting discrimination against religious clubs on the basis of content.[113] Justice O'Connor's plurality opinion also strongly hinted at the free speech overtones of the case.[114]

In regard to the second issue, whether granting equal access to the Bible study club violated the Establishment Clause, the Court made clear what was suggested in *Widmar*: that neutral treatment of religion in a public forum does not violate the Establishment Clause.[115] No single opinion commanded a majority of the Court on that issue, but a focus on neutral treatment of religion meeting the Establishment Clause ran through various opinions.[116] Justice O'Connor's plurality opinion for four members of the Court stressed that the basic message of the Act was "one of neutrality, rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion."[117] Justices Scalia and Kennedy, although not agreeing with the endorsement analysis used by Justice O'Connor, nevertheless agreed that the neutral treatment of religion, in which religious speech was treated the same as other speech, met the dictates of the Establishment Clause.[118] Taken as a whole, *Mergens* clarified the premises implicit in *Widmar*: religious speech must be provided equal access to speech fora, and such neutral treatment of religion does not violate the

109. *See id.* at 235.

110. *See id.* at 247.

111. *See id.* at 234-35.

112. *See id.* at 235.

113. *See id.* at 262 (Marshall, J., concurring).

114. *See Mergens*, 496 U.S. at 250 (O'Connor, J., plurality opinion) ("there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect").

115. *See id.* at 248.

116. *See id.* at 248, 251 (plurality opinion); *id.* at 260-61 (Kennedy, J., concurring); *id.* at 264, 266, 270 (Marshall, J., concurring); *id.* at 273-74, 276 (Stevens, J., dissenting).

117. *Id.* at 248 (plurality opinion).

118. *See id.* at 260 (Kennedy, J., concurring).

Establishment Clause.[119]

This same analysis was seen three years later in *Lamb's Chapel v. Center Moriches Union Free School District*,[120] when the Court again held that excluding religious speech from a designated forum violated the Free Speech Clause.[121] In that case a school district policy permitted use of school facilities for various community groups, but specifically excluded religious uses on the grounds that it would violate the Establishment Clause.[122] A church requested to use a school building to show a film series on child-rearing, which would clearly have been a permitted use of the building except for the religious content involved.[123] For that reason the request was denied, and the church sued.[124] As it had in *Widmar*,[125] the Court held that excluding the church from a state-created speech forum violated the Free Speech Clause, and permitting the church on equal terms as other community groups did not violate the Establishment Clause.[126]

The Court began its analysis with the free speech issue, assuming, without deciding, that the school's policy only created a limited public forum.[127] Although subject-matter restrictions are permitted in such fora, any restrictions must still be viewpoint neutral.[128] Even under this narrow understanding of the school exclusion policy, the Court said the church's speech rights had been violated, since denying access to the church constituted not just subject-matter discrimination, but also viewpoint discrimination, fatal to restrictions in a limited public forum and generally considered the most egregious type of speech restriction.[129]

In reaching this conclusion, the Court rejected the school district's argument, adopted by the Court of Appeals below, that since the policy

119. *Compare id.* at 248 *with* Widmar v. Vincent, 454 U.S. 263, 277 (1981).

120. 508 U.S. 384 (1993).

121. *See id.* at 395.

122. *See id.* at 387, 395.

123. *See id.* at 387-89.

124. *See id.* at 386-89.

125. *See Widmar*, 454 U.S. at 269.

126. *See Lamb's Chapel*, 508 U.S. at 395.

127. The Court stated that the church's argument that the school district had created a designated public forum "ha[d] considerable force" because of the wide variety of groups that used the school facilities. *Id.* at 391. This would have precluded even subject-matter restrictions unless it was "justified by a compelling state interest and [was] narrowly drawn." *Id.* at 391. The Court declined to decide the issue, however, since the district policy failed even the less rigorous standard for limited public fora. *See id.* at 391-92.

128. *See id.* at 392-93. *See also* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106-07 (stating that speech restrictions in a limited public forum must be viewpoint neutral and reasonable).

129. *See Lamb's Chapel*, 508 U.S. at 394.

prohibited all religious uses it discriminated on the basis of subject-matter, which was permitted in a limited forum, but was viewpoint neutral.[130] The Supreme Court, however, characterized the policy much differently, stating that the relevant subject or topic for analysis was family issues and child rearing.[131] It noted that the school policy clearly permitted use of school facilities for lectures or films on family values and raising children, and that the record indicated the only reason the church's application was denied was because it involved a religious viewpoint.[132] As stated by the Court:

> The film series involved here no doubt dealt with a subject otherwise permissible under [district rules], and its exhibition was denied solely because the series dealt with the subject from a religious standpoint. The principle that has emerged from our cases "is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."[133]

The Court further held, as it had in *Widmar*[134] and *Mergens*,[135] that permitting the church to use the facility on the same terms as other community groups did not violate the Establishment Clause.[136] As it had in *Widmar*,[137] the Court stressed that under the circumstances of the case there was "no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the church would have been no more than incidental."[138] In a very cursory fashion it also noted the *Lemon* test was met.[139]

Two years later, in *Rosenberger v. Rector and Visitors of the University of Virginia*,[140] the Court again addressed exclusion of religious speech from a state-created forum.[141] In that case the University of Virginia provided funding for certain student publications, but specifically

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130. *See id.* at 393.

131. *Id.*

132. *Id.* at 393-94.

133. *Id.* (quoting City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984)).

134. *See* Widmar v. Vincent, 454 U.S. 263, 274-75 (1981).

135. *See* Bd. of Educ. v. Mergens, 496 U.S. 226, 247-48 (1990).

136. *See Lamb's Chapel*, 508 U.S. at 395.

137. *See Widmar*, 454 U.S. at 274.

138. *Lamb's Chapel*, 508 U.S. at 395.

139. The Court simply said:

> As in *Widmar*, permitting District property to be used to exhibit the film series involved in this case would not have been an establishment of religion under the three-part test articulated in *Lemon v. Kurtzman*: The challenged governmental action has a secular purpose, does not have the principal or primary effect of advancing or inhibiting religion, and does not foster an excessive entanglement with religion.

Id. at 395 (citations omitted).

140. 515 U.S. 819 (1995).

141. *See id.* at 822-23.

prohibited religious publications from receiving any funding, stating that direct financial support for religion violated the Establishment Clause.[142] In finding the policy excluding religious speech unconstitutional, the Court began its analysis by finding that the university in effect had created a public forum, which required that any restrictions be content-neutral, which the policy violated.[143] The Court then proceeded to hold that the university, by denying funds to student publications writing from a religious perspective, had engaged in viewpoint discrimination, and its actions were therefore unconstitutional.[144] The Court acknowledged that the distinction between subject-matter and viewpoint discrimination is not always clear, but found that the university's policy constituted the same type of viewpoint bias as in *Lamb's Chapel*, stating:

> We conclude, nonetheless, that here, as in *Lamb's Chapel*, viewpoint discrimination is the proper way to interpret the University's objections to Wide Awake. By the very terms of the SAF prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments, for the subjects discussed were otherwise within the approved category of publications.[145]

Thus, as in *Lamb's Chapel*,[146] the Court interpreted the policy in question not as excluding religion as a subject, but rather excluding the religious viewpoint on a number of subjects that a student publication might address.[147] Moreover, the Court rejected the idea that the policy was valid because all religious (and antireligious) viewpoints were excluded, stating that such a position rests on the "insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious speech."[148] Rejecting what it described as a "contrived description of the

142. The guidelines prohibited reimbursement of publication costs for "religious activities," which it defined as an activity that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality." *Id.* at 824-25.

143. The Court described the forum created by the university's reimbursement policy for student publications as being "more in a metaphysical than a spatial or geographic sense," but noted that it had previously recognized that public forum principles still applied. *See id.* at 830.

144. *See id.* at 831-32.

145. *Id.* at 831.

146. *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393-94 (1993).

147. *See Rosenberger*, 515 U.S. at 831.

148. *Id.*

marketplace of ideas,"[149] the Court said:

> If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one. It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint. The dissent's declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways.[150]

Having concluded that denying funding for religious perspectives constituted viewpoint discrimination, the Court next addressed whether funding religious publications on the same basis as other student groups would violate the Establishment Clause.[151] Unlike *Lamb's Chapel*[152] and *Widmar*,[153] which involved granting religious groups equal access to public facilities, the Establishment Clause issue here, funding of a blatantly religious message,[154] was more problematic. As emphasized by the dissent, financial support of religion was almost certainly one of the principal concerns giving rise to the Establishment Clause.[155] Significantly, James Madison's *Memorial and Remonstrance Against Religious Assessments*,[156] generally considered the single most important document in understanding the environment giving rise to the Establishment Clause,[157] discussed at length the particular problem of financially supporting religion. The Court itself had previously permitted some aid to religious schools when carefully structured, but required that the aid not be used for religious

149. *Id.*

150. *Id.* at 831-32.

151. *See id.* at 837.

152. *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 386-87 (1993).

153. *See* Widmar v. Vincent, 454 U.S. 263, 264-65 (1981).

154. The publication at issue, *Wide Awake*, was designed to offer "a Christian perspective on both personal and community issues, especially those relevant to college students at the University of Virginia," and had featured articles on a variety of topics, including racism, crisis pregnancy, missionary work, and eating disorders, and also included music reviews and interviews with professors. *Rosenberger*, 515 U.S. at 826. At the same time, its stated two-fold mission was clear: "to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means." *Id.*

155. "Using public funds for the direct subsidization of preaching the word is categorically forbidden under the Establishment Clause, and if the Clause was meant to accomplish nothing else, it was meant to bar this use of public money." *Id.* at 868 (Souter, J., dissenting).

156. 8 JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, *in* THE PAPERS OF JAMES MADISON 298, 298-304 (Robert A. Rutland et al. eds., 1973).

157. The Supreme Court has frequently emphasized the importance of Madison's *Memorial and Remonstrance Against Religious Assessments* and looked to it as providing guidance to understanding the Establishment Clause. *See, e.g.*, Comm. for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 770 n.28 (1973); Everson v. Bd. of Educ., 330 U.S. 1, 11-13 (1947).

indoctrination.[158] Yet, as stressed by the dissent, the funds at issue in *Rosenberger* would be used to propagate an unequivocal Christian message, which the dissent stated was "categorically forbidden under the Establishment Clause."[159] Even Justice O'Connor, in a concurring opinion, acknowledged that the case involved the clash of two bedrock constitutional principles, one of which was "the prohibition on state funding of religious activities."[160]

Despite these concerns, the Court held that providing equal funding to religious publications would not violate the Establishment Clause, stressing, as it did in *Lamb's Chapel*,[161] the neutrality of such a scheme.[162] The Court began its Establishment Clause discussion by stating, "[a] central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion."[163] The Court noted this principle also applied to free speech equal access cases, stating that it had "[m]ore than once" rejected the idea that the Establishment Clause prohibited "extend[ing] free speech rights to religious speakers who participate in broad-reaching government programs neutral in design."[164] On that basis the Court held that including a religious publication in the funding program would not violate the Establishment Clause, since it would simply be treating religion neutrally, rather than preferentially.[165] The Court also stated that the program's neutrality helped distinguish it from the Founders' concerns about taxes to support churches.[166] Whereas those involved taxes "for the sole and exclusive purpose of establishing and supporting specific sects,"[167] the program at issue involved student fees that supported a broad range of ideas and thought, only some of which might potentially be religious.[168]

While primarily stressing the program's neutrality, the Court also noted that not only were funds allocated from student fees, rather than general tax

158. *See, e.g.*, Roemer v. Bd. of Pub. Works, 426 U.S. 736, 751-61 (1976) (financial grants to religious colleges not to be used for sectarian purposes); Hunt v. McNair, 413 U.S. 734, 743 (1973) (aid cannot fund "a specifically religious activity").

159. *See Rosenberger*, 515 U.S. at 868 (Souter, J., dissenting).

160. *See id.* at 847 (O'Connor, J., concurring).

161. *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 395 (1993).

162. *See Rosenberger*, 515 U.S. at 840.

163. *Id.* at 839.

164. *See id.*

165. *See id.* at 840.

166. *See id.*

167. *Id.*

168. *See Rosenberger*, 515 U.S. at 840-41.

revenues, but that no money went directly to student groups.[169] Instead, qualified student groups contracted for services and the bills submitted to the student council, which then paid the creditors.[170] The Court stated that this was similar to the aid provided in *Widmar* and *Lamb's Chapel*, in that those cases also involved the indirect expenditure of money by providing meeting rooms for the religious groups involved in those cases.[171] It said the same essentially occurred here, with the university paying for printing services to be accessed by a broad range of student groups, reasoning that "[a]ny benefit to religion is incidental to the government's provision of secular services for secular purposes on a religion-neutral basis. Printing is a routine, secular, and recurring attribute of student life."[172]

A final and more recent case illustrating how content-neutrality protects religious speech and at the same time avoids Establishment Clause concerns is *Good News Club v. Milford Central School*,[173] a 2001 decision. In that case a school district adopted regulations identifying several purposes for which local schools could be open to public use, including "instruction in any branch of education, learning or the arts," and for "social, civic, and recreational meetings and entertainment events."[174] Pursuant to that policy, a local "Good News Club," a Christian organization for young children, sought permission to use the building after school.[175] A typical meeting would include learning and reciting Bible verses, singing songs (presumably Christian), hearing a Bible story, and closing with a prayer.[176] Although school policy permitted other groups, such as the Boy Scouts, to use the building, the school refused permission for the Good News Club to meet because of the religious nature of the meetings.[177]

As in the previous cases, the Supreme Court held that excluding the religious group from a state-created public forum violated the Free Speech Clause, and permitting the group to use the building on the same terms as other groups did not violate the Establishment Clause.[178] The Court began

169. *See id.* at 841.

170. *See id.* at 842-44.

171. *See id.* at 843.

172. *Id.* at 843-44. The Court also stated that "[b]y paying outside printers, the University in fact attains a further degree of separation from the student publication, for it avoids the duties of supervision, escapes the costs of upkeep, repair, and replacement attributable to student use, and has a clear record of costs." *Id.* at 844.

173. 533 U.S. 98 (2001).

174. *Id.* at 102.

175. *Id.* at 103.

176. *See id.*

177. *Id.* at 103-04, 108.

178. *See id.* at 102.

its free speech analysis by recognizing that at a minimum the school had created a limited public forum, which required that speech restrictions not discriminate on the basis of viewpoint and be reasonable.[179] Relying upon its previous analysis in *Lamb's Chapel* and *Rosenberger*, the Court held that excluding religious groups from the forum constituted viewpoint discrimination and was thus unconstitutional.[180] The Court stated that it was clear, under the school's guidelines, that any group that "promotes the moral and character development of children," such as the Boy Scouts, is permitted to meet on school property.[181] Therefore, the Good News Club was seeking to address a subject otherwise permitted under the guidelines, moral and character development, from a religious perspective, and to exclude the group constituted impermissible viewpoint discrimination.[182] In reaching this conclusion, the Court rejected the argument, relied on by the Court of Appeals, that the devotional nature of the Club's activities, which included prayer and teaching students "to cultivate [a] relationship with God through Jesus Christ," made it distinct from other viewpoints.[183] Instead, the Supreme Court said that even "quintessentially religious" expression, arguably akin to worship, can also be characterized as the teaching of moral and character development from a particular viewpoint, and, as such, cannot be discriminated against.[184] The effect of the policy was to exclude a particular viewpoint (religious) on moral and character development, and, therefore, violated the group's free speech rights.[185]

The Court then addressed the Establishment Clause issue, concluding, as it had in previous cases, that permitting the Good News Club to meet on the same terms as other groups would not violate the Establishment Clause.[186] The Court began by noting that the Establishment Clause issue was essentially the same one addressed in *Lamb's Chapel* and *Widmar*, both of which clearly established that granting religious speech equal access to a school-created forum did not violate the Establishment Clause.[187] The Court also noted, as it did in *Rosenberger*,[188] that a significant factor in Establishment Clause analysis is neutrality toward religion, and "[b]ecause allowing the Club to speak on school grounds would ensure neutrality, not

179. *Good News Club*, 533 U.S. at 106-07.
180. *See id.* at 107.
181. *See id.* at 108.
182. *See id.* at 107.
183. *See id.* at 110-11.
184. *See id.* at 111-12.
185. *See Good News Club*, 533 U.S. at 111-12.
186. *See id.* at 113.
187. *See id.* at 112-14.
188. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 839 (1995).

threaten it," the school "face[d] an uphill battle in arguing that the Establishment Clause compels it to exclude the Good News Club."[189] Finally, the Court said there was no coercive pressure to participate in club activities, since the decision to participate was up to parents, not children.[190]

The Court's decision in *Good News Club*, its most recent decision regarding religious speech, largely reinforced the previous holdings of the Rehnquist Court: that excluding religious speech from state-created fora violates the Free Speech Clause, and giving religious speech equal access to such fora does not violate the Establishment Clause.[191] Indeed, as noted earlier, the genesis of the free speech rights analysis can be traced back to the public forum cases of the 1930's, 40's, and 50's,[192] and the Court's 1981 decision in *Widmar*,[193] which essentially set out the basic free speech and Establishment Clause analysis that was later affirmed in *Mergens*,[194] *Lamb's Chapel*,[195] *Rosenberger*,[196] and *Good News Club*.[197] These Rehnquist Court cases, therefore, did not so much take the Court in a new direction as affirm and solidify earlier doctrine and analysis.

In two important respects, however, the Rehnquist Court took religious speech rights a step further and strengthened the protection given to religious speech. First, whereas *Widmar* had treated the exclusion of religious speech as content-discrimination,[198] the Court in *Lamb's Chapel*, *Rosenberger*, and *Good News Club* characterized it as viewpoint discrimination, a much more problematic form of speech discrimination, and one that is almost inevitably unconstitutional.[199] It is important to

189. *See Good News Club*, 533 U.S. at 114.

190. *See id.* at 115.

191. *See id.* at 120.

192. *See, e.g.*, Poulos v. New Hampshire, 345 U.S. 395, 396-97 (1953); Fowler v. Rhode Island, 345 U.S. 67, 69 (1953); Niemotko v. Maryland, 340 U.S. 268, 269, 271-72 (1951); Saia v. New York, 334 U.S. 558, 559-60 (1948); Marsh v. Alabama, 326 U.S. 501, 502, 504-05 (1946); Tucker v. Texas, 326 U.S. 517, 520 (1946); Follett v. Town of McCormick, 321 U.S. 573, 576-77 (1944); Taylor v. Mississippi, 319 U.S. 583, 589-90 (1943); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); Martin v. City of Struthers, 319 U.S. 141, 141-42 (1943); Murdock v. Pennsylvania, 319 U.S. 105, 108-09 (1943); Douglas v. City of Jeannette, 319 U.S. 157, 161-62 (1943); Jamison v. Texas, 318 U.S. 413, 414 (1943); Largent v. Texas, 318 U.S. 418, 422 (1943); Jones v. City of Opelika, 316 U.S. 584, 593-96 (1942); Cox v. New Hampshire, 312 U.S. 569, 571 (1941); Schneider v. New Jersey, 308 U.S. 147, 164 (1939); Lovell v. City of Griffin, 303 U.S. 444 (1938).

193. *See* Widmar v. Vincent, 454 U.S. 263, 267-77 (1981).

194. *See* Bd. of Educ. v. Mergens, 496 U.S. 226, 253 (1990).

195. *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393-95 (1993).

196. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 830-46 (1995).

197. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 120 (2001).

198. *See Widmar*, 454 U.S. at 267-77.

199. *See Good News Club*, 533 U.S. at 106-07, 109-10; *Rosenberger*, 515 U.S. at 829-31;

emphasize how significant this characterization is. Although any type of content discrimination is problematic, the Court has stressed that viewpoint discrimination is a particularly troublesome type of discrimination.[200] Professor Rodney Smolla puts it this way in his treatise: "The doctrinal difference between content-based discrimination and viewpoint-based discrimination is certainly significant. Content-based discrimination normally triggers strict scrutiny (or some other form of heightened scrutiny), often resulting in the law being held unconstitutional. Laws that engage in viewpoint discrimination have even tougher going."[201] The Court in *Rosenberger* made this same point, stating that "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant," and labeling viewpoint discrimination "an egregious form of content discrimination."[202]

Thus, it is no small matter that the Court in these cases began characterizing the exclusion of religious speech as not just exclusion of religion as a category of speech, but rather as exclusion of religious viewpoints on a variety of broader social issues. The Rehnquist Court made that change by viewing each of the fora in question as addressing particular social issues, but excluding the religious viewpoint in each. In *Lamb's Chapel* it was discussion of child-rearing,[203] in *Rosenberger* it was a variety of political and social issues,[204] and in *Good News Club* it was character and moral development.[205] Thus, what might be superficially seen as merely excluding a particular speech content—religion—was reconceptualized as exclusion of particular viewpoints—religious—on a broad set of issues addressing society. The consequence was to provide an even greater level of protection to religious speech than had previously existed.

The second way in which the Rehnquist Court solidified the use of free speech to protect religion was in how it handled the Establishment Clause issue that is inevitably presented in these types of cases. What was implicit in *Widmar*, that the neutral treatment of religion would not violate the Establishment Clause,[206] became more overt in the Rehnquist Court years.

Lamb's Chapel, 508 U.S. at 393-94.

200. *See* Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n, 512 U.S. 622, 641-43 (1994); R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992); City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).

201. RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 3.11 (2008).

202. *See Rosenberger*, 515 U.S. at 829.

203. *See Lamb's Chapel*, 508 U.S. at 387.

204. *See Rosenberger*, 515 U.S. at 825-27.

205. *See Good News Club*, 533 U.S. at 108.

206. *See* Widmar v. Vincent, 454 U.S. 263, 267 (1981).

All four cases—*Mergens*, *Lamb's Chapel*, *Rosenberger*, and *Good News Club*—emphasized that neutral treatment of religious speech mitigates any Establishment Clause concerns.[207] This was particularly true in *Rosenberger* and *Good News Club*, where the Court made neutrality the central factor in its analysis and which almost, but not quite, guarantees the Establishment Clause is not violated if religion is treated the same as other speech, no better and no worse.[208]

Perhaps even more significant, however, were the fact patterns in those last two cases, which involved areas in which the Court had often closely scrutinized government involvement with religion. In *Rosenberger* this involved use of government monies to fund an overt, even blatant religious message.[209] In *Good News Club* it was overtly religious activity, such as prayer and Bible study, in the context of an elementary school,[210] where students are the most impressionable. Both of these are highly sensitive Establishment Clause areas, in which both historical understandings and the Court's own jurisprudence suggest any government association with religious activity should be closely scrutinized.[211] Yet in both of these contexts the Court essentially said the neutral treatment of religion, as required by the Free Speech Clause, would trump any Establishment Clause concerns.[212]

In sum, the Rehnquist Court increasingly relied on free speech principles to provide protection to religious liberty under the increasingly powerful concept of neutrality. Religion was certainly not given any preferred status under the Free Speech Clause, but it became clear it could not be given less.[213] This became particularly important as the exercise of religious speech shifted to contexts that began to present legitimate, and in some instances significant, Establishment Clause concerns.[214] The neutrality and equal treatment mandated by free speech also mitigated any Establishment Clause concerns that might exist, creating a nice symmetry between the two clauses in regard to religious speech.[215]

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207. *See Good News Club*, 533 U.S. at 114; *Rosenberger*, 515 U.S. at 839; *Lamb's Chapel*, 508 U.S. at 395; Bd. of Educ. v. Mergens, 496 U.S. 226, 248 (1990).

208. *See Good News Club*, 533 U.S. at 114; *Rosenberger*, 515 U.S. at 845-46.

209. *See Rosenberger*, 515 U.S. at 823-24.

210. *See Good News Club*, 533 U.S. at 102-03.

211. *See* Edwards v. Aguillard, 482 U.S. 578, 583-84 (1987) ("The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools.").

212. *See Good News Club*, 533 U.S. at 114; *Rosenberger*, 515 U.S. at 839.

213. *See supra* Part II.A.

214. *See supra* Part II.A.

215. *See supra* Part II.A.

Finally, in order to appreciate fully the ascendancy of free speech protection for religious liberty, attention should be paid to what was happening to free exercise protection during this period. Neutrality was also emerging as a powerful concept here, but with the opposite result; rather than strengthening protection under the Free Exercise Clause, it came close to eliminating it.[216] The next subsection will examine this development, first briefly discussing the Court's earlier development of free exercise doctrine, and then examining the Rehnquist Court's change of direction.

B. The Demise of Free Exercise

The Free Exercise Clause, though never being relied upon as much as the Free Speech Clause to protect religious liberty, still emerged during the mid-twentieth century as a significant source of protection for religious freedom distinct from free speech.[217] Indeed, for nearly three decades the Supreme Court articulated a Free Exercise Clause jurisprudence which, at least in theory, provided significant and unique protection for religious rights.[218] This was substantially changed during the Rehnquist Court years, with the Court largely rejecting its prior analysis and greatly limiting the reach and significance of free exercise protection.[219]

One of the Court's earliest Free Exercise Clause cases, *Reynolds v. United States*,[220] did not suggest a particularly expansive protection for religious liberty. In that case the Court examined whether a federal law making polygamy a crime violated the free exercise rights of Mormons, whose religion mandated polygamy as a practice.[221] In rejecting the claim, the Court stated that the law itself was valid and supported by strong public policy,[222] and thus the only issue was whether the Mormons' religious beliefs exempted them from the law.[223] The Court said no, drawing a basic distinction between actions, which can be regulated, and beliefs, which

216. *See infra* Part II.B.

217. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 402-03 (1963); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

218. *See, e.g.*, *infra* text accompanying notes 234-60.

219. *See infra* text accompanying notes 261-83.

220. 98 U.S. 145 (1878).

221. *Id.* at 161-62.

222. *See id.* at 166-67. The Court stated that polygamy "had always been odious" to Western nations of Europe and considered an offense against society and prohibited by law. *Id.* at 164-65.

223. *Id.* at 166.

government cannot interfere with.[224] To hold otherwise would "permit every citizen to become a law unto himself,"[225] leading to chaos. Although not saying how far this belief/conduct distinction should be pushed, the tone of the opinion suggested very little or no protection for religious practices themselves, at least when contrary to perceived public policy.[226]

By the 1940's, however, the Court began to indicate that religious acts and practices were also subject to some, though not complete, protection under the Free Exercise Clause. In *Cantwell v. Connecticut*,[227] in which the Court first incorporated the Free Exercise Clause into the Fourteenth Amendment,[228] it reiterated the belief/conduct distinction laid out in *Reynolds*, stating: "[T]he Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."[229]

The Court proceeded to state, however, that government's ability to regulate conduct was not absolute, and must be exercised so as not "unduly to infringe the protected freedom."[230] For example, the Court said that it clearly was unconstitutional to deny the "right to preach or to disseminate religious views."[231] On the other hand, the state can put reasonable time, place, and manner restrictions on the use of streets for religious activities.[232] Although not clarifying how free exercise protection would differ from that available under free speech, the Court did make clear that free exercise rights extended to conduct as well as belief.[233]

Free Exercise Clause analysis came into its own, however, in *Sherbert v. Verner*,[234] a 1963 decision, in which the Court established a unique and potentially powerful free exercise analysis. In *Sherbert*, the Court reviewed a South Carolina statute that denied unemployment benefits to a Seventh-day Adventist because she refused to work on Saturday due to her religious

224. *See id.* at 166 ("Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.").

225. *Id.*

226. *See Reynolds*, 98 U.S. at 166-67.

227. 310 U.S. 296 (1940).

228. *Id.* at 303.

229. *Id.* at 303-04.

230. *Id.* at 304 ("In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.").

231. *Id.*

232. *See id.*

233. *Cantwell*, 310 U.S. at 303.

234. 374 U.S. 398 (1963).

beliefs.[235] In finding the denial of benefits unconstitutional, the Court revealed a two-step analysis for resolving free exercise questions.[236] First, a court must determine whether the government is in fact infringing upon a person's free exercise right.[237] Second, if such rights are in fact infringed, then the action is subject to strict scrutiny, requiring that the infringement is the least restrictive means of furthering a compelling state interest.[238]

In finding that the denial of benefits in *Sherbert* did in fact infringe the claimant's free exercise rights, the Court focused on the coercive effect the denial placed on the claimant to abandon a cardinal tenet of her religion.[239] The Court emphasized that the claimant's ineligibility for benefits derived "solely from the practice of her religion,"[240] suggesting that she, in effect, was being penalized for her religious beliefs. As the Court noted, the law forced the claimant to choose between her religion and receiving important government benefits, placing the same kind of burden on her beliefs as a direct prohibition would.[241] The state failed to establish a compelling interest sufficient to justify this infringement, since the state's asserted interest in avoiding false claims by those "feigning religious objections to Saturday work" lacked any proof of an actual problem.[242] Moreover, even if such proof existed, the state would still have to show that no alternative means of addressing the possibility of fraud existed, which it failed to do.[243]

The free exercise analysis established in *Sherbert* was significant in several respects. First, it made clear that even neutral and general laws not focused on religion trigger free exercise concerns if the law, as applied to a particular person, imposes a significant burden on religious exercise, triggering heightened scrutiny.[244] Second, in applying strict scrutiny, the Court's analysis indicated that the issue in the case was not the importance of the overall state program, including the requirement that claimants be willing to work on Saturdays, but rather whether the state must grant an

235. *Id.* at 399-400. To qualify for unemployment compensation, an applicant had to be able to and available for work, and accept suitable work when offered by the unemployment office or an employer. *Id.* at 400-01.

236. *See id.* at 403.

237. *See id.*

238. *See id.*

239. *Id.* at 404.

240. *Sherbert*, 374 U.S. at 404.

241. *See id.* at 403-04. The Court also rejected the argument that the Constitution was not violated because unemployment benefits are not a "'right,' but merely a 'privilege,'" stating, "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Id.* at 404.

242. *See id.* at 407.

243. *See id.* at 406-07.

244. *See id.* at 406.

exemption from such a requirement to those with religious burdens.[245] The effect was to require exemptions for religious adherents whose beliefs would be substantially burdened by a law, the very thing that the Court in *Reynolds* characterized as unworkable.[246] The Court in *Sherbert* also rejected the argument that granting such exemptions would violate the Establishment Clause, stating that it "reflects nothing more than the governmental obligation of neutrality in the face of religious differences."[247]

Over the next three decades the Court applied and refined the two-step Free Exercise Clause analysis of *Sherbert* in a number of cases, perhaps most notably in *Wisconsin v. Yoder*.[248] There the Court held that Wisconsin's compulsory education law, which required school attendance until sixteen, violated the rights of the Amish, whose religion prohibited attending school after eighth grade.[249] In finding the law unconstitutional as applied to the Amish, the Court engaged in *Sherbert's* two-step analysis, although doing it in a way that involved balancing the respective interests at stake.[250] It began by examining the impact of Wisconsin's compulsory education law on Amish faith, concluding that it imposed a substantial burden on a core religious belief.[251] It then assessed whether the state was justified in applying the law to the Amish, stating that only an overriding interest would justify an infringement of free exercise rights.[252] The Court proceeded to compare the state's interest in requiring additional schooling for the Amish (which was minimal) against the burden imposed on the Amish religion (which was substantial),[253] concluding that the law as

245. *Id.*

246. *See* Reynolds v. United States, 98 U.S. 145, 166-67 (1878).

247. *Sherbert*, 374 U.S. at 409.

248. 406 U.S. 205 (1972).

249. *Id.* at 218-19.

250. *Id.* at 214.

251. *See id.* at 215-19.

252. The Court made clear that it was not enough to show a compelling interest in compulsory education in general, but once a substantial burden on religion was shown, then the state must show a compelling interest in applying the law to the Amish:

> We turn, then, to the State's broader contention that its interest in its system of compulsory education is so compelling that even the established religious practices of the Amish must give way. Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption.

Id. at 221.

253. *See id.* at 214 ("a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment").

applied to the Amish was unconstitutional.[254]

Yoder therefore refined the *Sherbert* analysis by introducing an element of balancing in determining whether the law should be applied to a religious adherent, an element found in subsequent free exercise decisions.[255] Yet *Yoder* and other decisions confirmed the basic analysis set out in *Sherbert*, in which once it was shown that a government act imposes a substantial burden on religious exercise, then the state must demonstrate an "overriding" interest in applying the law to the religious adherent; otherwise, an exemption must be granted.[256] The Court often found the state had a compelling or overriding interest in not exempting the burdened religious adherent,[257] leading some to observe that the heightened free exercise protection was more theoretical than real.[258] But despite the results of some decisions, the analytical framework constructed and followed by the Court during this period applied to any law that imposed a significant burden on religious exercise, even if only incidental to the law's purpose.[259] Even such incidental burdens on religion triggered heightened, and at times, rigorous scrutiny.[260]

This standard of free exercise analysis for any substantial burden on religion came to an abrupt, and to most people, surprising end in *Employment Division v. Smith*,[261] a 1990 decision. In that case two Native Americans had ingested peyote as part of a religious observance at their

254. *Yoder*, 406 U.S. at 234.

255. *See, e.g.*, United States v. Lee, 455 U.S. 252, 257-58 (1982) ("The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.").

256. *See* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141 (1987); Goldman v. Weinberger, 475 U.S. 503, 506-07 (1986); *Lee*, 455 U.S. at 257-58; Thomas v. Review Bd., 450 U.S. 707, 718 (1981).

257. *See, e.g.*, *Lee*, 455 U.S. at 258-60.

258. *See, e.g.*, Jesse H. Choper, *The Rise and Decline of the Constitutional Protection of Religious Liberty*, 70 NEB. L. REV. 651, 684 (1991) ("This major change in free exercise protection [after *Smith*, *see infra* text accompanying notes 261-71,] will probably have little effect upon future results in the Supreme Court, because despite its former doctrine, the Court generally did not protect free exercise interests significantly. But *Smith* will have a major impact upon the disposition of free exercise claims in the lower federal and state courts, which were taking the compelling government interest test seriously and requiring exemptions for religious activities in a substantial number of case each year."); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1110 (1990).

259. For example, the Court in *Yoder* was very specific that even "regulations of general applicability" and a regulation "neutral on its face" might so burden religion so as to constitute a violation of the Free Exercise Clause. *Yoder*, 406 U.S. at 220.

260. *See, e.g.*, *id.* at 220-21.

261. 494 U.S. 872, 878-79 (1990), *reh'g denied*, 496 U.S. 913 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507, 532-36 (1997).

Native American church.[262] Use of peyote was illegal under Oregon law, and as a result the two men were fired from their jobs as counselors at a private drug rehabilitation center.[263] They were subsequently deemed ineligible for unemployment benefits, since they had been discharged for work-related misconduct.[264] The two men challenged the denial of benefits under the Free Exercise Clause, arguing that as applied to them it imposed a substantial burden on their religious exercise, since peyote use served sacramental purposes at their church.[265] Further, they argued the state lacked a compelling interest in not granting them an exemption.[266]

The Supreme Court, in a 5-4 decision, held that the law did not violate the Free Exercise rights of the claimants, articulating an analysis that, at least facially, changed and greatly limited the reach of free exercise protection.[267] The Court began by recognizing the noncontroversial proposition that the First Amendment prohibits "governmental regulation of religious *beliefs* as such."[268] When it comes to religious conduct, however, the Court in *Smith* drew a fundamental distinction between laws that specifically target religion, which are subject to strict scrutiny, and neutral laws of general applicability that have an incidental burden on religion.[269] According to the Court, the latter category never constitute an infringement of free exercise, no matter how substantial the burden on religious exercise.[270] In particular, the Court stated that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes or (prescribes) conduct that his religion prescribes (or proscribes).'"[271]

The Court acknowledged that in some cases it had applied strict scrutiny to burdens on religion incidental to general laws, thus requiring an exemption, but it distinguished those as special situations.[272] It stated that *Yoder* had involved a "hybrid situation" in which free exercise concerns were reinforced by the substantive due process rights of parents to raise

262. *See id.* at 874.
263. *Id.*
264. *Id.*
265. *See id.* at 882-83.
266. *Id.*
267. *Smith*, 494 U.S. at 890.
268. *Id.* at 877.
269. *Id.* at 877-79.
270. *Id.* at 878-79.
271. *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).
272. *See id.* at 881.

their children.[273] Similarly, it distinguished *Sherbert* and similar cases that involved unemployment compensation schemes, saying that since such schemes already provided for individualized assessment of applicants, the Free Exercise Clause requires that burdens on religion also be considered.[274] But in the typical instance of neutral laws of general applicability, the Court said the Free Exercise Clause by itself is not implicated by incidental burdens on religion, or even substantial ones.[275] Echoing concerns expressed in *Reynolds* more than a century earlier, the Court said that any other approach "would be courting anarchy" and give rise to a host of practical problems.[276] Since the case before it concerned a neutral and generally applicable law, and did not involve either of the exceptions recognized by the Court, the Court held there was no free exercise infringement.[277]

Despite its efforts to distinguish *Yoder*, *Sherbert*, and other free exercise cases, it was clear that the majority in *Smith* substantially changed, and greatly restricted, prior free exercise doctrine, a point emphasized by both Justice O'Connor's concurring opinion[278] and the dissenting

273. *See Smith*, 494 U.S. at 881-82. The Court noted that in *Yoder* it had not only discussed Amish free exercise rights, but had also recognized the substantive due process rights of parents "to direct the religious upbringing of their children," first recognized in *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925), with the Court in *Yoder* specifically linking the two. *See id.* at 881 n.1; Wisconsin v. Yoder, 406 U.S. 205, 233 (1972) ("when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment.").

The Court also stated that the free exercise claim in *Cantwell* was tied to the free speech claims present in the case, and noted that a number of other cases involving religious freedom were decided solely on free speech grounds. *See Smith*, 494 U.S. at 881.

274. *See Smith*, 494 U.S. at 882-85. The Court stated that "[t]he *Sherbert* test, it must be recalled, was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct . . . a distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment . . . ." *Id.* at 884.

275. *Id.* at 884-86.

276. *Id.* at 888. The Court stated:

> Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.

Id. (citation omitted).

277. *Id.* at 882.

278. Justice O'Connor explicitly rejected the majority's analysis, stating that it "misreads settled First Amendment precedent" and fails to give any "convincing reason to depart from settled First Amendment jurisprudence." *Smith*, 494 U.S. at 901, 903 (O'Connor, J., concurring in

opinions.[279] Unless a claimant fits into one of the two narrow exceptions recognized by the Court, there is no free exercise right for burdens imposed by neutral and generally applicable laws.[280] Instead, any accommodation of unique burdens on religious exercise must occur at the political, not the constitutional level, a point made by the majority.[281] The Free Exercise Clause itself is limited to those rare instances where government intentionally targets religion with unique burdens or prohibitions.[282] The neutral treatment of religion, even if it incidentally imposes significant burdens on religious exercise, does not violate the Free Exercise Clause.[283]

In a sense, the *Smith* Court's paramount focus on neutrality in free exercise analysis was the mirror image of what was happening with religious rights under free speech and Establishment Clause jurisprudence.[284] In all three arenas the Rehnquist Court made neutrality the central benchmark of constitutionality, but with markedly different impacts on religious liberty.[285] Whereas the focus on neutrality under free speech and the Establishment Clauses enhanced religious liberty, the focus

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judgment). She stated that free exercise rights are implicated any time government imposes a burden on religious exercise, "whether the burden is imposed directly through laws that prohibit or compel specific religious practices, or indirectly through laws that, in effect, make abandonment of one's own religion or conformity to the religious beliefs of others the price of an equal place in the civil community." *Id.* at 897. She concluded, however, that Oregon had a compelling interest in not exempting the claimants from the state's prohibition of peyote use. *See id.* at 905-07.

279. Justice Blackmun's dissent, joined by Justices Brennan and Marshall, stated:

> This Court over the years painstakingly has developed a consistent and exacting standard to test the constitutionality of a state statute that burdens the free exercise of religion. Such a statute may stand only if the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means.

Id. at 907 (Blackmun, J., dissenting). He proceeds to state that the majority avoids that long-established standard only by "mischaracterizing this Court's precedents." *Id.* at 908. Unlike Justice O'Connor, however, he concluded that the state did not have a compelling interest in not granting an exemption for religious use of peyote in Native-American ceremonies. *See id.* at 920. A large number of legal commentators have similarly argued that *Smith* greatly changed, and substantially restricted, prior Free Exercise Clause doctrine. *See, e.g.*, Vincent Martin Bonventre, *The Fall of Free Exercise: From "No Law" to Compelling Interests to Any Law Otherwise Valid*, 70 ALB. L. REV. 1399, 1411-15 (2007); Richard F. Duncan, *Free Exercise is Dead, Long Live Free Exercise:* Smith, Lukumi *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 851 (2001) ("the Supreme Court cast aside almost three decades of free exercise jurisprudence when it handed down its decision in *Smith*.")

280. *See Smith*, 494 U.S. at 877.

281. The Court in *Smith* stated that a society such as ours that believes in religious freedom is likely "to be solicitous" of that in the political process. *Id.* at 890.

282. For a rare example of such a case, decided by the Supreme Court three years after *Smith*, see *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

283. *See Smith*, 494 U.S. at 878-79.

284. *See supra* text accompanying notes 213-16.

285. *See supra* Parts I-II.A.

on neutrality under free exercise diminished it.[286] The clear result of the Court's increasing reliance on concepts of neutrality was to shift protection of religious liberty even more in the direction of free speech, where it had long had a well-established home.[287]

In one important respect, however, the Court's focus on neutrality in *Smith* was not complete, or at least not strict. Although making it clear that states are not constitutionally required to accommodate religious concerns in otherwise neutral and generally applicable laws, the Court was equally clear that states were constitutionally permitted to accommodate religion by granting religious adherents exemptions from such laws.[288] Indeed, the Court emphasized this point near the end of its opinion, stating that in a society such as ours it is likely that legislatures will be "solicitous" of religious needs[289] and granting such exemptions poses no Establishment Clause problem.[290]

Recognizing the constitutional permissibility of religious exemptions, though not the constitutional necessity, was an extremely important dimension to *Smith*,[291] and one that provides the potential for meaningful protection of religious liberty. In that regard, the Court was probably right; legislatures will often be solicitous of the needs of the religious groups.[292] Yet from a constitutional perspective, the impact of *Smith* was dramatic, making it clear that the Free Exercise Clause provided little protection to religious exercise.[293] Neutrality largely shifted the focus even more toward free speech and away from free exercise.[294]

III. WHAT THIS MIGHT MEAN

Let me conclude by briefly commenting on possible implications of the Court's increasing reliance on free speech to protect religious liberty, examining the issue from two perspectives: (1) what these cases say about how the Court views the role of religion in American life; and (2) how the Court's increasing focus on free speech, rather than free exercise, fits with the challenges that both America as a nation and religion face in the twenty-first century.

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286. *See supra* Part II.
287. *See supra* Parts I-II.A.
288. Employment Div. v. Smith, 494 U.S. 872, 890 (1990).
289. *Id.*
290. *See id.*
291. *See id.*
292. *Id.*
293. *See supra* text accompanying notes 261-83.
294. *See supra* text accompanying notes 261-83.

A. How the Court Views Religion

The Rehnquist Court's emphasis on neutrality, which emerges in its free speech, free exercise, and Establishment Clause jurisprudence, has resulted in an increased focus on free speech principles to protect religious liberty.[295] Rather than treating religion as unique, both in the threats religion poses and in the protections it needs, neutrality tends to view religion as similar to other influences, values and ideas in American society.[296] To be sure, the Court still sees religion as somewhat unique in our constitutional order, as the existence of the Establishment and Free Exercise Clauses more or less require.[297] But the Court's increasing focus on neutrality has tended to minimize that uniqueness, while shifting even more of the protection for religious liberty to free speech.[298]

It is worth noting that this retooling of religious liberty took place during a time of national discussion—debate, if you will—on the proper role of religion in public life. That debate was precipitated largely, though by no means exclusively, by the rise of the religious right, and concerned not only religion's role in politics, but also in other public arenas. Much of it concerned constitutional understandings of religion's role in society and understandings of separation of church and state, but also broader discussions of what the obligations of good citizenship requires in a liberal democracy.[299] The discussion has generated a host of academic articles and books,[300] but has also been prominent in the popular media.

At the risk of oversimplification, people tend to fall into one of two groups regarding religion's role in America's public life. First, many believe that religion should remain largely private and away from

295. *See supra* text accompanying notes 261-83.

296. *See supra* text accompanying notes 203-05.

297. For example, the Court has continued to interpret the Establishment Clause to prohibit government promotion of religion, especially in public schools. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301 (2000); Lee v. Weisman, 505 U.S. 577, 599 (1992). And although the Court's decision in *Smith* greatly diminished the previous scope of protection under the Free Exercise Clause, that clause still prohibits targeting religion for unique burdens.

298. *See supra* Part II.A.

299. *See infra* note 300.

300. *See, e.g.*, ROBERT AUDI & NICHOLAS WOLTERSTORFF, RELIGION IN THE PUBLIC SQUARE: THE PLACE OF RELIGIOUS CONVICTIONS IN POLITICAL DEBATE (1997); KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988); MICHAEL J. PERRY, LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS (1991); MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES (1997); Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611 (1993); Douglas G. Smith, *The Illiberalism of Liberalism: Religious Discourse in the Public Square*, 34 SAN DIEGO L. REV. 1571 (1997).

America's public life.[301] This group, often employing the rhetoric of separation of church and state, emphasizes the divisive nature of religion, the Founders' concern about religious intolerance, and the inaccessibility of religious values, which are derived through divine revelation rather than rational discourse.[302] This view sees religion as a potential threat to American values when it leaves its private domain and enters the public square.[303] In contrast, a second group has argued that religion should be viewed as a full co-participant in America's public life, with the same opportunity to influence the direction of this country as any other set of values.[304] This group does not see religion as a threat to America's public life, but rather as an important participant.[305]

It is clear that the Rehnquist Court's view of religion largely conforms to this second view. Rather than seeing religion as a threat to American values, the Court's jurisprudence clearly sees religion as a full co-participant in America's public life, to be received on the same terms as any other world view or value system.[306] This general view of religion, which clearly flows from the Rehnquist Court's religious speech cases,[307] includes the three following corollaries:

(1) religion is not intended to be merely a private affair, but has a public dimension to it;
(2) religious views have the same right to influence society as any other view; and
(3) as long as government treats religion equally and neutrally, religion is not a danger or threat to society.

This, of course, differs dramatically from the views of those who would privatize religion, but I believe is more in line with the Court's actual view of religion's role in American society. To be sure, the Court remains skeptical about *government* involvement in and promotion of religion, a

301. *See infra* notes 302-04.

302. *See, e.g.*, Robert Audi, *The Place of Religious Argument in a Free and Democratic Society*, 30 SAN DIEGO L. REV. 677, 679-86 (1993); Suzanna Sherry, *Enlightening the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 473, 476-85 (1996); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197-201 (1992).

303. *See, e.g.*, Sherry, *supra* note 302, at 495.

304. *See, e.g.*, RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA 139-42 (2d ed. 1986); MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES 44 (1997); Douglas Laycock, *Freedom of Speech That Is Both Religious and Political*, 29 U.C. DAVIS L. REV. 793, 798 (1996); Smith, *supra* note 300, at 1641.

305. *See, e.g.*, Smith, *supra* note 300.

306. *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106-07 (2001); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 386, 393-94 (1993).

307. *See, e.g.*, *Good News Club*, 533 U.S. at 106-07; *Lamb's Chapel*, 508 U.S. at 393-94.

position it has maintained consistently for a number of years.[308] But it is much more positive about religion per se and its role in American public life.[309] In that context the Court views religion as a valued co-participant in America's public life, with the same right to influence the direction of the nation as any other belief or value system.[310]

This view of religion as co-participant in America's public life is reflected in two aspects of the Rehnquist Court jurisprudence. First, by characterizing the exclusion of religious speech as viewpoint discrimination, the Court not only increased the level of protection given to religious speech,[311] but saw that speech through a slightly different lens. Rather than viewing the cases as merely excluding religion as a subject, the Court consistently saw prohibitions on religious speech as excluding religious views on various societal concerns: child-rearing, character and moral development, and social issues.[312] From this perspective, government is creating speech fora for the purpose of discussing various issues, and the impact of denying access to religious speech is to exclude the religious viewpoint on those issues.[313] The Rehnquist Court made clear, however, that religion has an equal right to participate in those debates.[314]

The second way the Rehnquist Court strongly reinforced religion's right to be a co-participant was by not allowing the Establishment Clause to shut the door to religion's participation in such debates.[315] Many people latch on to the concept of separation of church and state as in fact precluding religion's participation in broader societal discussions, at least to the extent such discussion is taking place under the rubric of government sponsorship, as in public schools. But the Court, by emphasizing a neutrality analysis, eliminated the idea of the Establishment Clause as a barrier, saying the Constitution's basic concerns are addressed by treating

308. The Court has long maintained that government itself should not promote or sponsor religion, especially in public institutions like schools. *See* Engel v. Vitale, 370 U.S. 421, 425 (1962) (at a minimum, the Establishment Clause means that "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government"). The Court has maintained this strong stance against government promotion of religion in recent years. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 313 (2000); Lee v. Weisman, 505 U.S. 577, 588 (1992).

309. *See, e.g.*, *Good News Club*, 533 U.S. at 108-09; *Lamb's Chapel*, 508 U.S. at 394-95.

310. *See, e.g.*, *Good News Club*, 533 U.S. at 106-07; *Lamb's Chapel*, 508 U.S. at 394.

311. *See, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 831 (1995).

312. *See Good News Club*, 533 U.S. at 106-11 (character and moral development); *Rosenberger*, 515 U.S. at 831 (various societal issues); *Lamb's Chapel*, 508 U.S. at 393-94 (child-rearing).

313. *See, e.g.*, *Rosenberger*, 515 U.S. at 831.

314. *See id.*

315. *See Lamb's Chapel*, 508 U.S. at 395.

religion the same as everyone else—in other words, allowing it to participate on the same terms.[316] As mentioned before, there is a nice symmetry here—the neutrality that is mandated by free speech also serves to mitigate Establishment Clause concerns.

This symmetry centered on neutrality also aligns with one of the oldest and most consistent theories supporting the constitutional value of free speech: the marketplace of ideas. Under this theory the Free Speech Clause serves to permit free and open debate in the search for truth. As stated by the Court in *Police Department of Chicago v. Mosley*,[317] this includes the search for our cultural and political identity.[318] This theory has its roots in the writings of both John Milton and John Stuart Mill,[319] but became entrenched in American free speech jurisprudence through the judicial opinions of Oliver Wendell Holmes and Louis Brandeis.[320] The essence of this theory is that our commitment to free speech involves a system where all ideas can be tested on their own merits, with all being given equal entry and none preferred status.[321] As stated by Holmes in his famous dissent in *Abrams v. United States*,[322]

> the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.[323]

The Rehnquist Court's focus on neutrality in discussing religious speech—as requiring entry into public debate under the Free Speech Clause and not precluding entry into such debate under the Establishment Clause—

316. *See Good News Club*, 533 U.S. at 112-14; *Rosenberger*, 515 U.S. at 839-41; *Lamb's Chapel*, 515 U.S. at 394-95; Widmar v. Vincent, 454 U.S. 263, 274-75 (1981).

317. 408 U.S. 92 (1972).

318. The Court stated:

> To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."

Id. at 95-96 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

319. *See* SMOLLA, *supra* note 201.

320. *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., and Holmes, J., concurring); Abrams v. United States, 250 U.S. 616, 630-31 (1919) (Holmes, J., and Brandeis, J., dissenting).

321. *See Whitney*, 274 U.S. at 375 (Brandeis, J., and Holmes, J., concurring); *Abrams*, 250 U.S. at 630 (Holmes, J., and Brandeis, J., dissenting).

322. 250 U.S. 616 (1919).

323. *Id.* at 630 (Holmes, J., and Brandeis, J., dissenting). *See also Whitney*, 274 U.S. at 375 (Brandeis, J., and Holmes, J., concurring).

reflects the marketplace concept.[324] This marketplace metaphor is predicated on the constitutional understanding that all ideas, no matter what their source, should have equal access to public debate and discussion, and equal opportunity to influence the direction of public life.[325] This essentially is what the Rehnquist Court religious speech cases said—giving religion equal access to the marketplace of ideas poses no problem under the Establishment Clause, and free speech requires it.[326] The people themselves, rather than government, can judge the propriety and worth of religious perspectives on the issues constantly discussed in American public life.[327]

It should be noted, however, that the Rehnquist Court's view of religion as full co-participant in America's public life came with a cost, which was a significant loss of protection under the Free Exercise Clause. As noted earlier, whereas a focus on neutrality tended to protect religion as speech, the same emphasis on neutrality lessened protection under the Free Exercise Clause.[328] Specifically, the Court's decision in *Smith* held that the Free Exercise Clause is not violated as long as a law is neutral and of general applicability, even if it results in an incidental yet substantial burden on religious exercise.[329] In other words, religion must take the bitter with the sweet when it comes to being a co-participant in America's public life.

Thus, religion during the Rehnquist era lost much of its unique status, a unique status that to some would have limited its entry into public life, but

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324. *See, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 386, 394-95 (1993).

325. *See, e.g.*, *Abrams*, 250 U.S. at 630 (Holmes, J., and Brandeis, J., dissenting).

326. *See, e.g.*, *Lamb's Chapel*, 508 U.S. at 394.

327. The Court's emphasis on religion as a co-participant in influencing America's public life also finds considerable support in another highly regarded theory of free speech, self-governance. The self-governance theory is primarily associated with the work of Alexander Meiklejohn, who argued that free speech is the essence of democracy and without it self-governance ceases to exist. As stated by Meiklejohn, the purpose of free speech "is to give every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizen of a self-governing society must deal." ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 75 (1965). Such a view requires that speech, as it relates to the political process, be completely free of content discrimination:

> [T]he vital point, as stated negatively, is that no suggestion of policy shall be denied a hearing because it is on one side of the issue rather than another. And this means that . . . citizens . . . may not be barred because their views are thought to be false or dangerous. No plan of action shall be outlawed because someone in control thinks it unwise, unfair, un-American. . . . And the reason for this equality of status in the field of ideas lies deep in the very foundations of the self-governing process. When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger.

ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26 (1948).

328. *See supra* text accompanying note 286.

329. Employment Div. v. Smith, 494 U.S. 872, 879 (1990).

also a unique status that constitutionally provided protection when being a participant in American society created unique burdens. In the same way that neutrality guaranteed religion full access to America's public life and societal debates, an access strongly supported by the underlying values of free speech, so too did neutrality require that as a co-participant religion not be constitutionally released from the obligations and burdens that being a co-participant in America's public life brings.[330] The Court itself did not view this as a substantial loss, since it anticipated the political process would often release religion from substantial burdens that uniquely affect a particular religion,[331] but from a constitutional perspective it was a significant cost to pay.

In this sense the Rehnquist Court turned on its head some of the arguments made by those who would privatize faith, who see the religion clauses as creating a special balance or trade-off in which the Establishment Clause places special limits on religious participation in public life in exchange for special protections and exemptions granted to it under the Free Exercise Clause.[332] For example, both Kathleen Sullivan and Abner Greene have argued that the First Amendment contains an implicit balance, where the Establishment Clause limits religion's public participation in exchange for the special protections offered by Free Exercise, which exempts religious adherents from some general obligations when substantial burdens might exist. Greene puts it this way:

> [T]he Free Exercise Clause can be seen as providing a political counterweight to the Establishment Clause. If the latter should be read to prevent law from being based expressly on religious faith, then the former should be construed to make religious faith a ground for avoiding the obligations of law. In other words, a religious person can justifiably say, "You're keeping my religion out of your politics, now keep your politics out of my religion."[333]

Sullivan makes a similar argument, saying that the Establishment Clause implicitly "establishes a civil public order" to ensure an end to religious division.[334] She states that "[t]he price of this truce is the banishment of religion from the public square, but the reward should be allowing religious subcultures to withdraw from regulation insofar as compatible with peaceful diarchic coexistence."[335]

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330. *See id.* at 878-79.

331. *See id.* at 890.

332. *See* Greene, *supra* note 300, at 1634-35; Sullivan, *supra* note 302, at 222.

333. Greene, *supra* note 300, at 1634-35.

334. Sullivan, *supra* note 302, at 222.

335. *Id.*

But the Rehnquist Court rejects this balance or symmetry, adopting a more minimalist interpretation of the religion clauses.[336] Whereas Sullivan, Greene and others would give an expansive reach to the religion clauses—what is prohibited under the Establishment Clause and what is protected under Free Exercise—the Rehnquist Court narrows the reach of each, at least in terms of religion's own participation in America's public life.[337] In this sense religion is neither burdened with special disabilities under the Establishment Clause nor granted special protection under Free Exercise, opposite to the calculus suggested by Sullivan and Greene.[338] It was under the Free Speech Clause that the Rehnquist Court gave substantial protection to religious exercise, an approach very consistent with the view of religion as co-participant, since its protection under free speech is the same as any other speech.[339] What the Rehnquist Court made clear is that religious speech has the same basic speech rights as any other view, most importantly the right not to be excluded from public debate.[340]

Even the *Smith* Court's willingness to permit special accommodations for religion, just not require them, underscores this basic point.[341] Although at first glance this might appear to be a special accommodation to religion, it in fact reinforces the Rehnquist Court's minimalist approach to the Establishment Clause.[342] Whereas a strict neutrality approach might not permit even legislative accommodations,[343] the Rehnquist Court does not go that far. Although the neutral treatment of religion ensures the Establishment Clause is not violated, in other words, it is a sufficient condition, it is hardly a necessary one.[344] In the same way that non-religious groups may seek exemptions from legislative mandates, so may religion.[345] As such, permitting but not requiring legislative accommodations further reflects the Court's more minimalist approach to the religion clauses, which in turn reflects its view of religion as co-

336. *See, e.g.*, Good News Club v. Milford Sch. Dist., 533 U.S. 98, 112-13 (2001); *Smith*, 494 U.S. at 878-79.

337. *See, e.g.*, *Good News Club*, 533 U.S. at 112-13; *Smith*, 494 U.S. at 878-79.

338. *See* Greene, *supra* note 300, at 1634-35; Sullivan, *supra* note 302, at 222.

339. *See* Widmar v. Vincent, 454 U.S. 263, 269-70 (1981).

340. *See id.*

341. *See Smith*, 494 U.S. at 890.

342. *See, e.g.*, *Good News Club*, 533 U.S. at 112-13.

343. Scholars have at times drawn a distinction between formal neutrality, which would prohibit any distinct treatment of religion, and substantive neutrality, which permits special accommodations for religion so as to avoid coercive pressure on religious conduct. *See, e.g.*, Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 999-1006 (1990).

344. *See Smith*, 494 U.S. at 890.

345. *See id.*

participant deserving of the same treatment as others.[346]

This concept of religion as co-participant with equal rights and burdens is far from complete, however, for in two important respects the religion clauses continue to give religion a unique status. First, and most importantly, the Establishment Clause prohibits government itself from promoting religion.[347] Whereas the Rehnquist Court was very positive about religion per se and its role in American life, the Court remained very skeptical about government involvement in and promotion of religion.[348] This attitude of skepticism was most apparent in the context of public schools, where the Court drew a very rigid line against any government promotion or sponsorship of religion, even in attenuated circumstances.[349] But in other contexts the Court similarly rejected government itself promoting religion, making clear that the Establishment Clause continued to place a substantial barrier to government sponsoring or promoting religion.[350]

Second, even though the Rehnquist Court greatly limited the reach of free exercise protection against incidental burdens on religion, it interpreted the Free Exercise Clause as prohibiting laws that target religion for special burdens.[351] Such laws are very unusual, of course, but the Court's interpretation nevertheless provides some additional protection to religion that other groups might not have. This "anti-discrimination" dimension of free exercise partially overlaps with protection under the free speech clause which prohibits discrimination on the basis of speech content, including

346. *See id.*

347. *See, e.g.*, *Good News Club*, 533 U.S. at 106-07, 112-13.

348. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 305, 307-08 (2000); Lee v. Weisman, 505 U.S. 577, 587-90 (1992).

349. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 305, 307-08; *Lee*, 505 U.S. at 587-90.

350. This has been the case in the religious symbolism cases, where government has religious symbols on its property. The Court's jurisprudence in this area has been extremely confused, with the Court inevitably fractured, but a majority has consistently taken the position that it violates the Establishment Clause if government intends to promote or sponsor religion by the presence of such symbols. Although some justices have no problem with religious symbols on government property, the cases have typically turned on the context of the symbols and the perceptions created. If the religious symbol is part of a broader secular display, it is allowed, but if standing alone it is prohibited. *See* Van Orden v. Perry, 545 U.S. 677, 679, 681 (2005) (display of Ten Commandments on state capital grounds constitutional where simply part of a broader display); McCreary County, Kentucky v. Am. Civil Liberties Union, 545 U.S. 844, 850-51, 871-81 (2005) (display of Ten Commandments in court building unconstitutional where context and sequence of events indicated purpose was to promote religion); County of Allegheny v. Am. Civil Liberties Union, 492 U.S. 573, 578-79 (1989) (display of crèche unconstitutional where context suggested endorsement of Christianity, but display of Menorah constitutional where part of a broader secular display celebrating holiday season).

351. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532-33 (1993).

religious speech.[352] But the Court's interpretation of free exercise protection in *Smith* would also prohibit targeting non-expressive religious practices.[353]

Therefore, the Rehnquist Court recognized that the religion clauses of the First Amendment continue to provide religion with some degree of unique status under the Constitution, as any reasonable interpretation of those clauses must recognize.[354] Yet, even these two vestiges of uniqueness reinforce the idea of religion as co-participant in America's public life by stating that government must neither prefer nor explicitly inhibit religion.[355] The non-promotion view of the Establishment Clause does not prevent religion from full participation in public affairs, it just requires that it do so without the benefit of government sponsorship and promotion.[356] Similarly, the free exercise prohibition on laws targeting religion for special burdens[357] levels the playing field, again reflecting a vision of equal participation in America's public life.

B. How this Model Fits in the Twenty-First Century

A final question is how the Court's view of religion as a co-participant in America's public life, with only limited prohibitions and protections, fits with the challenges that both America and religion face in the twenty-first century. Opinions will obviously differ to that question, with no clear answer, and to some extent will simply turn on presuppositions regarding whether religion should be kept private or not. But a few comments seem in order.

First, in terms of America itself, the religion as speech model, with religion as a co-participant in public affairs, fits in quite well with our nation's landscape in the twenty-first century. As a practical matter, the idea of public religion that participates in America's public life and influences the direction our nation takes, even politically, has been the model for most of our nation's history.[358] The Founders almost certainly

352. *See, e.g., Good News Club*, 533 U.S. at 106-07.

353. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 533.

354. *See id.* at 532-33.

355. *See Good News Club*, 533 U.S. at 112-13; *Church of the Lukumi Babalu Aye*, 508 U.S. at 532.

356. *See, e.g., Good News Club*, 533 U.S. at 112-14.

357. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 532-33.

358. For discussions of the role religion has played in American politics at various stages of our nation's history, *see, e.g.*, RUTH H. BLOCH, VISIONARY REPUBLIC: MILLENNIAL THEMES IN AMERICAN THOUGHT 1756-1800 *passim* (1985) (American revolution); DANIEL WALKER HOWE,

contemplated that this would be the case, notwithstanding the dangers that religious divisions posed to the new nation.[359] The Establishment Clause guarded against such divisions, not by banning religion from America's public life, but by creating the idea of government itself being secular, one that would neither establish nor promote religion.[360] This permitted religion to participate in public affairs, including political activity, but precluded government from promoting religious views.[361]

Such a vision for America, which essentially is that adopted by the Rehnquist Court, seems equally suitable for today, if not more so. The Founders anticipated religion's involvement in American public life and politics notwithstanding the threat that religious divisions might pose to political stability.[362] That threat was a very real danger in the minds of the Founders, in particular because the religious wars that plagued Europe in the sixteenth and seventeenth-centuries were still a relatively recent event, and one that demonstrated the painful consequences that religious conflict is capable of producing.[363] Yet we today are far removed from any such dangers, and the American experiment itself has proved to be one that has permitted religion's participation in America's public life without the threat of political instability and even war. No one can make a serious argument that those are even remote concerns today.

Moreover, the Rehnquist Court's view of religion as co-participant still precludes government itself from promoting religion.[364] The types of government-sponsored religion today pale in comparison to the types of

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THE POLITICAL CULTURE OF THE AMERICAN WHIGS 150-80 (1979) (discussing the significant influence of Evangelical though on Whig politics); Martin E. Marty, *The Twentieth Century: Protestants and Others*, *in* RELIGION AND AMERICAN POLITICS: FROM THE COLONIAL PERIOD TO THE 1980S 322, 322-33 (Mark A. Noll ed., 1990).

359. For example, in James Madison's celebrated Federalist No. 10, where he argues for the advantages of a well-constructed union against the problem of political actions, Madison notes that factions can be addressed either by removing its causes or by controlling its effects. He rejects the former as sacrificing liberty, or prescribing a cure worse than the disease. *See* THE FEDERALIST No. 10, at 77-78 (James Madison) (Clinton Rossiter ed., 1961). Madison asserted that the proper solution is found not in removing the causes of factions, but in controlling their effects through a representative form of government. *See id.* at 80-84. Significantly, Madison identified religion as one of several possible sources of political factions. *See id.* at 79.

360. *See, e.g.*, Engel v. Vitale, 370 U.S. 421, 425 (1962).

361. For an elaboration of this argument, *see* Mark W. Cordes, *Politics, Religion, and the First Amendment*, 50 DEPAUL L. REV. 111, 127-42 (2000).

362. *See* THE FEDERALIST No. 10 (James Madison), *supra* note 359, at 77-78, 80-84.

363. For example, James Madison's famous *Memorial and Remonstrance Against Religious Assessments*, considered one of the most important documents on the concerns giving rise to the Establishment Clause, made several references to the religious wars of Europe as a reason to avoid a blending of church and state. *See* MADISON, *supra* note 156, at 300-03.

364. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 305, 307-08 (2000); Lee v. Weisman, 505 U.S. 577, 587-90 (1992).

government-sponsored religion in earlier eras, which included officially established churches, requiring religious oaths for office, and levying special taxes to support churches.[365] Today the Court is typically confronted with modest efforts to promote religion in school,[366] and various sorts of religious symbolism on government property, such as nativity scenes and displays of the Ten Commandments.[367] These are serious issues, to be sure, but are a far cry from how government promoted religion in earlier periods.[368] Yet even here the Supreme Court has drawn a relatively bright and rigid line against government promotion and endorsement of religion.[369] The Rehnquist Court in particular made that line rigid, rejecting even tenuous efforts to promote prayer in school.[370]

Thus, the Rehnquist Court's view of religion in public life poses very little threat to American governance or political values. At the same time it is very consistent with our society's commitment to political equality and freedom of speech, where ideas are tested in the marketplace and accepted or rejected by their intuitive appeal.[371] This certainly has been the dominant philosophy of the Supreme Court[372] and, in most people's minds, been one that has generally worked well for our nation.[373] Religion as co-participant fits well into this mainstream and arguably is a natural and even inevitable consequence of it. Most importantly, it poses no danger to our governance, political stability, or national identity, and seems to enhance, rather than detract from the core American values of equality and individual liberty.

Those who would privatize faith, however, have often argued that inclusion of religious values and argument are inconsistent with the understandings of a liberal democracy such as the United States, especially

365. *See* ANSON PHELPS STOKES & LEO PFEFFER, CHURCH AND STATE IN THE UNITED STATES 78-82 (1964) (detailing the array of church-state contacts that existed at the time Federal Constitution was drafted); *see also* THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 1-77 (1986).

366. *See, e.g.*, *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 294; *Lee*, 505 U.S. at 580.

367. *See supra* note 350.

368. *See* STOKES & PFEFFER, *supra* note 365.

369. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 305, 307-08; *Lee*, 505 U.S. at 587-90; Engel v. Vitale, 370 U.S. 421, 425 (1962); *supra* note 350.

370. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 305, 307-08; *Lee*, 505 U.S. at 587-90; *Engel*, 370 U.S. at 425.

371. *See, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 386, 394-95 (1993); Police Dep't v. Mosley, 408 U.S. 92, 95-96 (1972).

372. *See, e.g.*, *Lamb's Chapel*, 508 U.S. at 394-95; Police Dep't v. Mosley, 408 U.S. 92, 95-96 (1972); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., and Holmes, J., concurring); Abrams v. United States, 250 U.S. 616, 630-31 (1919) (Holmes, J., and Brandeis, J., dissenting).

373. *See, e.g.*, *supra* note 327.

at this stage of our nation's history.[374] In particular, some have argued that liberal democratic ideals of respect and equal treatment of others requires that public policy be based only on commonly shared principles that are "accessible" to others, and that people should not have their freedom limited by principles that are largely "inaccessible" or not understood by them.[375] At the heart of this inaccessibility argument is the idea that religious understanding is epistemologically different from other knowledge, and especially knowledge obtained by secular reasoning.[376] Religious values are based on faith, not reason, and therefore cannot be understood by others who have not been enlightened by such faith.[377] As such, it precludes others from understanding the basis on which decisions are made, in a way or at least to a degree that rational discourse does not, and therefore does not fit into the marketplace of ideas in the same way as other speech contents.[378] Some have argued that for these reasons the Founders intended that religion be private,[379] not a co-participant in America's public life. But to many the accessibility issue is particularly compelling today, where America is far more diverse and society itself is far more secular.

The above "accessibility" argument, although intuitively appealing on one level, has two basic problems. First, as argued by Scott Idleman, the argument is overbroad since religious knowledge and values are not completely inaccessible to nonadherents.[380] Putting aside the possibility of conversion, which might not be viewed as a realistic option, many religious norms are accessible to some degree to nonadherents. This is particularly true of Christian faith, which is by far the largest religion in this country and the one most likely to influence public life.[381] Christian knowledge, beliefs and values are generally not based on direct and individualistic communications from God to believers, but on tradition, natural law, and most importantly scripture. The nonadherent can equally examine and seek

374. *See* Greene, *supra* note 300, at 1623.

375. *See* GREENAWALT, *supra* note 300; THOMAS NAGEL, EQUALITY AND PARTIALITY 161-64 (1991); Greene, *supra* note 300, at 1620-23; Sherry, *supra* note 302, at 478-89; *see also* BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 345-48 (1980).

376. *See, e.g.*, Greene, *supra* note 300, at 1623.

377. *See, e.g.*, *id.* (permitting religious norms in lawmaking would exclude nonbelievers, since they would "lack access to the source of normative authority that is offered as the basis for the law they are told to obey").

378. *See, e.g.*, *id.* *Contra* Police Dep't v. Mosley, 408 U.S. 92, 95-96 (1972).

379. *See* Sherry, *supra* note 302, at 483-89.

380. *See* Scott C. Idleman, *Ideology as Interpretation: A Reply to Professor Greene's Theory of the Religion Clauses*, 1994 U. ILL. L. REV. 337, 344-48.

381. Christianity Today – General Statistics and Facts of Christianity Today, http://christianity.about.com/od/denominations/p/christiantoday.htm (last visited Dec. 21, 2008).

to understand such sources and debate their meanings. [382] This might take substantial work, but that is no different than understanding any other competing world view.

Moreover, even for those not inclined to study sacred texts and traditions, religious views often reflect values and principles easily understood and responded to by others. For example, a Christian might oppose euthanasia because the Bible teaches the worth and dignity of human life. Presented at that level, and religious views often are, nonadherents can both understand the concept and respond to it, engaging in discussion of why the concept of the "worth and dignity of human life" might lead to opposition or support of euthanasia. Indeed, on a host of issues, including poverty, national security, environmental protection, racial discrimination, the economy and others, the Bible is interpreted not as stating specific answers but providing general principles of guidance, principles which are usually quite accessible to nonadherents.[383] None of this is meant to suggest that religious knowledge is fully accessible to those outside the faith; it clearly is not. But it does demonstrate that the inaccessibility argument is overstated, and that religious understandings are accessible to others, at least in the same way that many other perspectives are accessible.

This leads to the second, and more significant problem with the inaccessibility argument which is that it is also underinclusive. By that I simply mean that secular beliefs suffer from the same accessibility problem and are, for the most part, equally inaccessible as religious beliefs. In the final analysis, religious values are epistemologically no different than secular beliefs—both are ultimately grounded in unproveable presumptions, accepted as a matter of faith. Although secular beliefs are often veiled in a way religious claims are not, the result is the same: religious and nonreligious views involve a comparable epistemological process to arrive at an ultimate conclusion, with neither in and of themselves able to establish an epistemological high ground.

This point has been made by a number of critics of those who seek to privatize faith. Idleman writes:

> [C]onsider the presumptive equality or intrinsic worth of all human beings—the very cornerstone of modern civil rights. As a normative starting point, this presumption is widely shared and largely not open to debate for a majority of people in the United States today. Yet, can such a starting point actually be derived from "human experience" alone? The answer is emphatically no. At some point, one or more nonprovable

382. *See* Idleman, *supra* note 380, at 344-46.

383. *Id.* at 344-45.

normative propositions must enter the calculus.[384]

Others have also noted that all secular forms of reasoning designed to arrive at proper judgments, political or otherwise, ultimately rest on nonprovable normative assumptions, accepted in a manner of faith similar to the ways religious beliefs might be.[385] These are, of course, often unstated, creating the appearance of being epistemologically different, when in fact they are not.[386] As Larry Alexander puts it, there is no "epistemological divide" between religious and other value systems in a liberal democracy.[387] Any attempts to exclude religious discourse and values from being a co-participant in influencing America's public life because they are not subject to reasoned assessment would equally discredit any other value system.

What Alexander, Idleman, and others have shown is that religious values and secular values are ultimately grounded in the same way.[388] It is true that with secular value systems these are often unspoken first premises, yet that does not change the reality that their way of "knowing" is not on some epistemological high ground. At the same time it needs to be emphasized that religious value systems, though obviously grounded in elements of faith, almost always also involve deliberation and reasoning to form their views.[389] Both religious and secular ways of thinking employ elements of deliberation and reason, yet each involves "leaps of faith" at various points.[390] Therefore, the argument that because religion is epistemologically different it should be more private and kept away from public affairs fails. That argument was false at the time of our nation's founding, and continues to be false in the twenty-first century, even in the context of a decidedly secular culture. The Supreme Court's view of religion as co-participant[391] fits in very well with who we have been as a nation and who we will continue to be in the future.

For all these reasons the Rehnquist Court's view of religion as co-participant in America's public life, with only limited special prohibitions and protections,[392] fits quite well with America in the twenty-first century.

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384. *Id.* at 349.

385. *See* Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology*, 30 SAN DIEGO L. REV. 763, 775 (1993).

386. *Id.*

387. *Id.* at 774.

388. *See id.*; Idleman, *supra* note 380, at 349.

389. *See* Alexander, *supra* note 385, at 768-69.

390. *See* Idleman, *supra* note 380, at 349.

391. *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106-07 (2001); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 386, 393-95 (1993).

392. *See supra* Part II.

Such a vision poses very little, if any threat, to America's constitutional and political order, and, if anything, supports it. Whatever influence religion might have in its role as co-participant is up to religion itself and its inherent worth, the same as in any other set of ideas and values in the marketplace of ideas.

A second question is whether the Rehnquist Court's view of religion fits in with the challenges religion itself will face in the twenty-first century. This is a much different matter, and one for which no clear answer exists. Each religion is unique and manifests itself, both privately and publicly, in different ways. Despite growing religious diversity, the United States remains overwhelmingly Christian, but even here Christian denominations vary considerably.[393] For these reasons assessing whether the Rehnquist Court's view of religion fits with the challenges religion will face in this century, or even what those challenges will be, is a difficult if not impossible task.

Having said that, it might be argued that the Rehnquist Court's view of religion as co-participant in America's public life fits in relatively well with many of the challenges religion now faces and will face in the future. For a substantial part of our nation's history, religious liberty faced two primary threats—government attempts to interfere with religion and government attempts to establish or promote religion.[394] Although both concerns remain to some extent today, neither one poses the substantial threat that it did in the past. This is largely a result of our nation's increased sensitivity to religious diversity and tolerance on the one hand, and the extent to which the ideal of separation of church and state has been engrained in the American consciousness on the other.

For example, although government interference with religion still occurs, it is attenuated compared to previous periods in our history.[395] There are few instances today where government intentionally interferes with religion;[396] our societal emphasis on toleration and diversity precludes that for the most part. The more likely type of interference occurs from general laws which have incidental, yet substantial burdens on religion, such as occurred in *Smith*.[397] Even here, however, our societal emphasis on tolerance and respect for religious diversity make it likely that legislation

393. Comparing Christian Denominations – Statistics: Geography, http://christianity.about.com/od/denominationscomparison/ss/statisticschart_4.htm (last visited Dec. 21, 2008).

394. *See* STOKES & PFEFFER, *supra* note 365.

395. *Id.*

396. Exceptions to that principle occasionally occur. For an example of a rare instance where a local government intentionally interfered with religion, *see* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524-28 (1993).

397. Employment Div. v. Smith, 494 U.S. 872, 878-79 (1990).

itself will accommodate unique religions, an option that the *Smith* Court said was permissible and consistent with the Establishment Clause.[398] Indeed, after *Smith* the state of Oregon itself passed an exemption for the religious use of peyote.[399]

Similarly, concerns about government promotion of religion, though certainly very real today, are but a shadow of what they were in earlier periods of American history.[400] There are no serious efforts to establish official state churches, as existed at our founding and for several decades thereafter, nor efforts to recognize Christianity as our official religion, as periodically occurred throughout the nineteenth century.[401] Even efforts to pass a serious constitutional prayer amendment have largely run out of gas, and the type of civil religion that government identifies with is so void of meaningful substance as to not make it a threat to anyone. Even the religion in public school issues that continue to plague the courts, and will undoubtedly do so for years to come, today tend to be quite nuanced and at the margins, a far cry from the earlier cases of children reciting state-composed prayers.[402] And, as noted earlier, the Rehnquist Court's view of religion as co-participant continues to guard against any minor attempts to promote religion.[403]

What is likely to be the real challenge for religion in the twenty-first century is government and societal efforts to privatize religion. As suggested above, American society has certainly reached the point where it respects, or at least tolerates, a variety of religious faiths, and is not only not going to deliberately interfere with any, but will take affirmative steps to accommodate them.[404] At the same time, however, there is a growing sense on the part of many people that religion is and should remain a private matter, and in particular kept away from influencing America's public life.[405] This is in part a result of the growing dichotomy in the twentieth century between a highly religious people and an increasingly secular culture, with American cultural values being less and less influenced by the

398. *See id.* at 890.

399. *See* Garrett Epps, *The Story of Al Smith: The First Amendment Meets Grandfather Peyote*, *in* CONSTITUTIONAL LAW STORIES 477, 500 (Michael C. Dorf ed., 2004).

400. *See* STOKES & PFEFFER, *supra* note 365.

401. For a discussion of various efforts in the nineteenth century to recognize Christianity as our official religion, *see* ISAAC KRAMNICK & R. LAURENCE MOORE, THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS 131-49 (1996).

402. *See* Engel v. Vitale, 370 U.S. 421, 424 (1962).

403. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 305, 307-08 (2000); Lee v. Weisman, 505 U.S. 577, 587-90 (1992).

404. *See supra* text accompanying notes 395-99.

405. *See* Greene, *supra* note 300, at 1634-35; Sullivan, *supra* note 302, at 222.

religious values of its people.[406] As a consequence, many people believe that religion, though important, should be a private matter.[407] This perception finds reinforcement in misunderstandings of the Establishment Clause and the related idea of separation of church and state.

This growing movement to privatize religion has been well-documented by others, with perhaps the leading voices being Richard John Neuhaus and Stephen Carter. Neuhaus's 1983 book, *The Naked Public Square*,[408] detailed and discussed the growing tendency to privatize faith in this country, to make the public square devoid of religious influence.[409] A decade later Carter repeated this theme in *The Culture of Disbelief*,[410] using the phrase "God as a hobby" to describe societal attitudes toward religion: religion is fine as long as it is kept to yourself.[411] Central to both writers is the idea that society sees religion as irrelevant to broader societal concerns and is increasingly excluding religion from the public square.[412]

Even if Neuhaus's and Carters's claims are a bit overstated, their basic point has validity: there is a growing sense in this country that religion should be a private matter. It is perhaps displayed most prominently in the current debate over the role of religion in politics, with many people suggesting it is inappropriate for people of faith to bring their religious values into the political arena. But it is also seen in the types of cases the Rehnquist Court reviewed, in which government created a forum for speech but excluded religious speech.[413]

In this context I believe that the Court's growing emphasis on free speech jurisprudence is particularly appropriate for the challenges religion itself will face in this new century, because it addresses what might well be the primary threat to religious liberty: efforts to privatize religion, resulting

406. Starting at mid-century, a number of historians and social commentators began commenting on the twentieth century dichotomy of a highly religious people within a growing secular culture. For example, prominent theologian Reinhold Neibuhr characterized America as "at once the most religious and the most secular of nations." BARRY A. KOSMAN & SEYMOUR P. LACHMAN, ONE NATION UNDER GOD: RELIGION IN CONTEMPORARY AMERICAN SOCIETY 48 (1993) (quoting Neibuhr).

407. *See* Greene, *supra* note 300, at 1634-35; Sullivan, *supra* note 302, at 222.

408. NEUHAUS, *supra* note 304.

409. *See id.*

410. STEVEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (1993).

411. *See id.* at 23.

412. *See id.*; NEUHAUS, *supra* note 304.

413. *See, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 822-23 (1995); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 386, 394 (1993); *supra* text accompanying notes 93-100.

in discrimination against religion in public life.[414] Not only is free speech doctrine well-designed to protect against the specific types of discrimination that might take place, as seen in the school forum cases,[415] but it also sets a tone and communicates a broader message to society, that religion should be viewed as a full co-participant in America's public life.[416] It serves as a reminder of who we are as a people and the constitutional commitments that we embrace, which include a commitment to treat all value systems, including religious ones, with equal respect and dignity.

CONCLUSION

Protection of religious liberty and the development of free speech doctrine have long been intertwined, dating back to the 1930's and 1940's when modern free speech jurisprudence began to emerge.[417] The central role of free speech jurisprudence in protecting religious liberty came to full fruition in the Rehnquist Court years, however, when the Court adopted a strong neutrality analysis for religion issues.[418] While this focus on neutrality resulted in diminished protection under the Free Exercise Clause, it solidified the protection given religion under free speech.[419] In particular, in a series of cases the Court consistently characterized exclusion of religious speech from public speech fora as viewpoint discrimination, thereby providing religious speech the highest protection possible.[420] At the same time, the Court consistently held that the neutral treatment of religious speech avoided any Establishment Clause concerns, even in contexts which the Court has traditionally considered highly sensitive.[421]

This "religion as speech" approach, with its emphasis on neutrality,[422] fits well with the twenty-first century. It views religion as being a full co-participant in America's public life, being received on the same terms as any other value system.[423] Such an approach poses no threat to American

414. *See* Greene, *supra* note 300, at 1634-35; Sullivan, *supra* note 302, at 222.

415. *See supra* text accompanying notes 93-101.

416. *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106-07 (2001); *Lamb's Chapel*, 508 U.S. at 393-94.

417. *See supra* Part I.

418. *See supra* Part II.

419. *See supra* Part II.A.

420. *See supra* Part II.A.

421. *See, e.g.*, *Lamb's Chapel*, 508 U.S. at 395.

422. *See supra* Part II.

423. *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106-07 (2001); *Lamb's*

governance or political values, and seems to enhance, rather than detract from the core American values of equality and individual liberty.[424] It also is well positioned to face many of the challenges religion itself faces in this new century, which are more likely to arise from efforts to privatize religious faith than to interfere with it.[425] Free speech jurisprudence makes clear, however, that religion must be afforded the same opportunities to participate in the discussions and debates of American public life.[426]

Chapel, 508 U.S. at 393-94.

424. *See* Smith, *supra* note 300, at 1641.

425. *See, e.g.*, Greene, *supra* note 300, at 1634-35; Sullivan, *supra* note 302, at 222.

426. *See supra* Part II.